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## REPRESENTATION AND WARRANTY IN SALES.— HEILBUT v. BUCKLETON.

IN a previous number of this review<sup>1</sup> the writer criticized the well-known case of *Derry v. Peek*,<sup>2</sup> and pointed out the inconsistency between the English law relating to warranty and that governing liability for misrepresentation generally, in that an honest misrepresentation by a seller to induce the sale of goods was ground of liability, whereas, according to that decision, an honest misrepresentation made under other circumstances imposed no liability.

In a case recently decided by the House of Lords<sup>3</sup> the supposed inconsistency is denied. Express warranty is confined to the field of express contract, and it is said that no representation as such amounts to a warranty.

The case which so decided presented the following facts. The plaintiff inquired of the defendant whether his firm was bringing out a new rubber company. The defendant replied that they were, and the plaintiff then asked whether the company was all right. The defendant answered that his firm was bringing it out, to which the plaintiff rejoined that was good enough for him. The plaintiff was induced by this conversation to buy shares in the company, which proved a failure and the plaintiff lost his money. The jury

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<sup>1</sup> 24 HARV. L. REV. 415.

<sup>2</sup> 14 App. Cas. 337 [1889].

<sup>3</sup> *Heilbut v. Buckleton*, [1913] App. Cas. 30.



found that the company was not properly termed a rubber company, as it was engaged in other business as well as in raising rubber.

The Court of Appeal on these facts held the defendant liable as a warrantor of the truth of the statement that the company was a rubber company. The House of Lords, reversing this decision, held that there was no evidence proper to be submitted to the jury upon the question of warranty. Lord Haldane said:

"As neither the circumstances of the conversation nor its words were in dispute, I think that the question of warranty or representation was one purely of law, and that it ought not to have been submitted to the jury. . . . The words proved by the respondent were words which appear to me to have been words not of contract but of representation of fact. No doubt this representation formed part of the inducement to enter into the contract to take the shares which was made immediately afterwards, and was embodied in two letters dated the next day, April 15. But neither in these letters nor in the conversation itself are there words either expressing or, in my opinion, implying a special contract of warranty collateral to the main contract, which was one to procure allotment.

"It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it."<sup>4</sup>

The other Lords who delivered opinions made it equally clear that in their view no express warranty was possible unless the elements of a contract could be found. Lord Atkinson said:

"The question of Johnston's intention in making this affirmation remains. . . . The existence or non-existence of such an intention in the mind of the party making the affirmation, that his affirmation should be taken as a warranty of the truth of the fact affirmed, is, in an action of breach of warranty, no doubt a question for the decision of the jury which tries the action; and all the evidence in the case touching the knowledge, conduct, words, and actions of that party, from first to last, may be considered by them in arriving at a conclusion upon this question. In the present case it would appear to me that every relevant piece of evidence given, every fact proved, tends to disprove the existence of such an intention in Johnston's mind when this conversation took place, rather than to establish it."<sup>5</sup>

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<sup>4</sup> [1913] App. Cas. 30, 36.

<sup>5</sup> [1913] App. Cas. 30, 43.

On page 44 the same judge said:

"But it would not be enough that Johnston should have offered to give a warranty as a term of the bargain to take these shares. The plaintiff should accept that offer and act upon it so as to make complete the collateral contract."

Lord Moulton said:

"Neither the plaintiff nor the defendants were asked any question or gave any evidence tending to shew the existence of any *animus contrahendi* other than as regards the main contracts. The whole case for the existence of a collateral contract therefore rests on the mere fact that the statement was made as to the character of the company, and if this is to be treated as evidence sufficient to establish the existence of a collateral contract of the kind alleged the same result must follow with regard to any other statement relating to the subject-matter of a contract made by a contracting party prior to its execution. This would negative entirely the firmly established rule that an innocent representation gives no right to damages. It would amount to saying that the making of any representation prior to a contract relating to its subject-matter is sufficient to establish the existence of a collateral contract that the statement is true and therefore to give a right to damages if such should not be the case."<sup>6</sup>

The only authorities on which the Lords rely to support their conclusion are the well-known case of *Chandelor v. Lopus*<sup>7</sup> and the *dictum* of Buller in *Pasley v. Freeman*, that "it was rightly held by Holt, J., cited in the subsequent cases, and has been adopted ever since, that an affirmation at the time of a sale is a warranty, provided that it appears on evidence to have been so intended."<sup>8</sup> In fact Lord Holt said nothing about intent in any of the reports of the cases cited by Buller, and Buller was too far removed in time from Holt to permit the supposition that he had any other knowledge of what Holt said than what the reports might give to him and equally give to us. The *dictum* of Buller, however, forms the basis of a positive assertion by Lord Moulton that Lord Holt regarded intent to warrant a material element. By this the court understands intent to contract, though if Lord Holt did make any such statement as that imputed to him he can hardly have meant intent to contract, since no action of *assumpsit* was ever brought

<sup>6</sup> [1913] App. Cas. 30, 48.

<sup>7</sup> Cro. Jac. 4 [1603].

<sup>8</sup> 3 T. R. 51, 57 [1789].



on a warranty until long after Lord Holt's time.<sup>9</sup> Clearly anyone using the language in question in 1700 must have used it as meaning intent to affirm a fact as the basis of or inducement to a sale.

Moreover, if Holt did say what Buller imputed to him, and if *Chandelor v. Lopus* affords support to the decision of *Heilbut v. Buckleton*, it is a novel application of the doctrine of *stare decisis* to disregard the numerous decisions on the law of warranty during the past century, and hark back to a decision nearly three hundred years old and to a *dictum* pronounced over a century ago, before the law on the subject had been developed.<sup>10</sup> The writer has elsewhere endeavored to show that warranty by representation is not to be confined within the limits of the law of contracts, and that in so far as the seller's intent (of course meaning his apparent, not his actual intent) is an essential element of a warranty, it is only his intent to assert a fact in order to induce a sale, not his intent to enter into a contract. It is not necessary to repeat the argument, but it is worth while perhaps to show the inconsistency of the recent decision with what has heretofore passed as the law of England.

Lord Moulton is careful to point out in his opinion that he has "been dealing only with warranty or representation relating to a specific thing. This is wholly distinct from the question which arises when goods are sold by description and their answering to that description becomes a condition of the contract."<sup>11</sup> It is, of course, true that there is a marked distinction in the seller's obligations where he has contracted to sell by description, and where he sells specific goods. In the former case the seller's obligation by the very terms of his contract require him to fulfil the description as its meaning would be understood by a reasonable man.

Though the original basis of warranty was deceit and not contract, and though much confusion would be avoided if it were borne in mind that not only historically but analytically the scope of warranty in sales goes beyond the bounds of contract, it must be conceded that, at least on the English authorities, warranty is to be regarded as a contractual liability. But it cannot be admitted that prior to the recent decision of the House of Lords it was

<sup>9</sup> See 24 HARV. L. REV. 410-421.

<sup>10</sup> 24 HARV. L. REV. 419; Williston, Sales, § 201.

<sup>11</sup> [1913] App. Cas. 30, 51.

supposed that this contractual liability could only arise where an offer and acceptance of a promise could be found. A representation which induced a sale if it was not itself a warranty at least was evidence justifying the inference of a warranty. This can best be shown by an examination of the English decisions.

There is rather a surprising dearth of cases in the eighteenth century subsequent to the decisions at the beginning of that century by Lord Holt. In 1797, however, it was held in *Jendwine v. Slade*<sup>12</sup> that a description of two pictures in a catalogue as painted by certain artists did not afford evidence of a warranty. Forty years later in a case very similar in its facts in *Power v. Barham*,<sup>13</sup> the court held the case properly left to the jury under the instruction that if "the defendant had made a representation as part of his contract that the pictures were genuine, not using the name of Canaletti as matter of description merely, or as an expression of opinion upon something as to which both parties would exercise a judgment, but taking upon himself to represent that the pictures were Canaletti's, the defendant was liable on a warranty." And Lord Denman said in his opinion in the court *in banc*: "It was therefore for the jury to say, under all the circumstances, what was the effect of the words and whether they implied a warranty of genuineness, or conveyed only a description, or an expression of opinion."

Williams, J., also said: "The words in question might be a mere expression of opinion, or might amount to a warranty: It was for the jury to say which they imported."

Between these two decisions there had been several others bearing upon the question. In *Shepherd v. Kain*,<sup>14</sup> in 1821, it appeared that an advertisement for the sale of a vessel described her as "copper fastened." The ship was only partially copper fastened, and Best, J., directed a verdict for the plaintiff, which was sustained by the upper court, though it was part of the contract that the ship should be taken "with all faults." The court construed these words to mean "all faults consistent with the advertisement." In *Kain v. Old*,<sup>15</sup> decided in 1824, a vessel was described as "copper bolted" in an instrument executed prior to the bill of sale of the vessel. It was held that the prior paper could not be regarded as

<sup>12</sup> 2 Esp. 572.

<sup>13</sup> Ad. & El. 473 [1836].

<sup>14</sup> 5 B. & Ald. 240.

<sup>15</sup> 2 B. & C. 627.



part of the contract; and if so intended would have been invalid because it did not recite the certificate of registry. Best, J., however, said, in regard to the statement, "If it be a mere representation, where is there a warranty to bind the vendor's executors?"<sup>16</sup> and Abbott, C. J.: "The description of copper bolted in the paper can therefore be considered as a representation only, and not as any part of the contract."<sup>17</sup>

In *Salmon v. Ward*,<sup>18</sup> a letter of the plaintiff stating "You will remember that you represented the horse to me as a five year old," and a reply from the defendant, "The horse is as I represented it," was held sufficient evidence to sustain a verdict for the plaintiff, Best, C. J., saying: "I quite agree that there is a difference between a warranty and a representation; because, a representation must be known to be wrong. . . . If a man says, this horse is sound, that is a warranty."

In *Cave v. Coleman*,<sup>19</sup> in 1828, a representation by a defendant that the plaintiff might "depend upon it that the horse is perfectly quiet, and free from vice," amounted to a warranty, Bayley, J., saying: "But that representation was that the horse was quiet, and free from vice, and being made in the course of dealing, and before the bargain was complete, it amounted to a warranty."<sup>20</sup>

In *Wood v. Smith*,<sup>21</sup> in 1829, a statement in regard to a horse by the seller, "I never warrant, but he is sound as far as I know," was held sufficient evidence to justify the jury's verdict for the plaintiff, Bayley, J., saying *in banc*: "The general rule is, that whatever a person represents at the time of a sale is a warranty."<sup>22</sup>

In *Allan v. Lake*,<sup>23</sup> in 1852, a specific lot of turnip seed was sold to the plaintiff under the description in a sold note, "Skirving's Swedes," and later another lot with the oral statement that it was "of the same stock" as the first. It was held that the description in the sold note amounted to a warranty that the seed was Skirving's Swedes, and that the statement at the subsequent sale was evidence of a similar warranty as to that lot. Coleridge, J., said: "If it had been limited to an assertion that the seed was turnip seed, that would without doubt be a warranty of the seed being turnip seed."

<sup>16</sup> 2 B. & C. 630.

<sup>18</sup> 2 C. & P. 211 [1825].

<sup>20</sup> Id. 3.

<sup>22</sup> Id. 46.

<sup>17</sup> Id. 634.

<sup>19</sup> 3 M. & R. 2.

<sup>21</sup> 4 C. & P. 45, 5 M. & R. 124.

<sup>23</sup> 18 Q. B. 560.

And, in like manner, when the defendant described the seed as Skirving's, he undertook that it should answer that description."<sup>24</sup>

Erle, J., said:

"When a vendor gives a description of the properties of an article, it is a question for the jury whether such description is a mere commendation of the article, or a direct representation that he sells it as being the particular article described."<sup>25</sup>

In *Hopkins v. Tanqueray*,<sup>26</sup> in 1854, an assurance that a horse was "perfectly sound" made on the day prior to the sale of the horse at auction, was held not to amount to a warranty; and a rule absolute was entered to set aside a verdict for the plaintiff. Jervis, C. J., said:

"I think it is quite clear that what passed amounted to a representation only, and not to a warranty."<sup>27</sup>

Maule, J., said:

"There appears to have been no more than an honest representation that the horse in the defendant's opinion, and so far as his knowledge went, was a perfectly sound horse."<sup>28</sup>

Cresswell, J., said:

"If the representation made at the stable on the Sunday had been made at the time of the sale, so as to form part of the contract, it might have amounted to a warranty."<sup>29</sup>

and Crowder, J.,

"A representation, to constitute a warranty, must be shewn to have been intended to form part of the contract."<sup>30</sup>

In *Carter v. Crick*,<sup>31</sup> in 1859, a statement that a sample of barley was "seed barley" to which the buyer on examination agreed was held not to amount to a warranty. Channell, B., said:

"I do not mean to suggest, that where there is a representation of a distinct article by the seller, that might not amount to a warranty although the word 'warrant' was not used. . . . Each arrived at the conclusion, as a matter of opinion, and as a matter of opinion only, that the barley was seed barley."<sup>32</sup>

<sup>24</sup> 18 Q. B. 565.

<sup>27</sup> Id. 138.

<sup>30</sup> Id. 142.

<sup>25</sup> Id. 566.

<sup>28</sup> Id. 140.

<sup>31</sup> 4 H. & N. 412.

<sup>26</sup> 15 C. B. 130.

<sup>29</sup> Id. 141.

<sup>32</sup> Id. 416.



And Pollock, C. B., said:

"The utmost that took place was a representation that the barley was seed barley." <sup>33</sup>

In *Stucley v. Baily*,<sup>34</sup> certain representations contained in letters in regard to a yacht bought by the plaintiff of the defendant were held at the trial to amount to a warranty, and a verdict was directed for the plaintiff. A rule was made absolute for a new trial on the ground that the evidence should have been submitted to the jury. Pollock, C. B., said:

"If, at an interview before the correspondence, the plaintiff said to the defendant 'I want to buy your vessel,' and the defendant replied, 'very well; the price is so and so,' adding, 'she is sound,' but never intending to warrant her; that, though falling very far short of conclusive evidence, might be important as shewing the meaning of the transaction." <sup>35</sup>

Bramwell B., said:

"No doubt a representation made at the time of the contract may amount to a warranty. If a man, when he sells a horse, says it is sound, that is a matter of fact; and when he makes a positive statement of that kind, he undertakes that he knows the fact; and if it is not so, he tells an untruth. So, if he does not know the fact, he equally tells an untruth, and there is no reason why he should not be responsible. I should be more inclined to hold a person liable upon a representation as to a matter of fact of that kind than as to a matter out of his ordinary knowledge. For instance, suppose a man says a horse is sound, and it turns out that it has some defect which it was impossible that he could have known, I doubt whether his language ought to be interpreted as a warranty." <sup>36</sup>

In *Cowdy v. Thomas* <sup>37</sup> the plaintiff bought of the defendant a second-hand locomotive in regard to which the seller had written, among other things, "firebox and tubes are copper." The verdict was taken for the plaintiff with leave reserved to set the verdict aside. The verdict was, however, sustained. Kelly, C. B., said:

"'Firebox and tubes are copper.' To say that that answer was only the expression of the defendant's opinion, would be, I think, to disregard the plain ordinary and obvious meaning of the words used by both

<sup>33</sup> 4 H. & N. 417.

<sup>36</sup> *Id.* 419, 420.

<sup>34</sup> 1 H. & C. 405 [1862].

<sup>37</sup> 36 L. T. N. S. 22 [1877].

<sup>35</sup> *Id.* 414.

parties on the occasion. When to a plain and direct question the answer given is equally plain and direct, and perfectly unqualified, as it was in the present instance, it is impossible, in my opinion, to treat such an answer as amounting to less than a warranty."<sup>38</sup>

Huddleston, B., said:

"The real question here is whether or not there was (whether intended to be so or not by the vendor) a warranty by him, and whether it was received and acted on as such by the vendee. Now it is not necessary that the representation which is alleged to be a warranty should be simultaneous with the conclusion of the bargain; it is sufficient if it be made in the course of the negotiation, and enters into the bargain as finally made, and so that the bargain is made on the footing of it. . . . Taking all these facts into consideration, I am of opinion that there was in this case a representation made by the defendant with regard to this engine, and the material of which the tubes were composed, that was intended by him to be, and which was, acted on by the plaintiff."<sup>39</sup>

The cases just cited and the extracts quoted are all, or substantially all, the authorities on the point; selected for whatever light they may throw upon the question, whether favorable or unfavorable to the writer's contention.

It is evident from an examination of these extracts that there has been considerable confusion in regard to the use of the words *warranty* and *representation*. Doubtless the confusion has been greatly aggravated by the manifold meanings attached to the word *warranty*.<sup>40</sup> That a representation is the antithesis of warranty, as that word is used in the language of insurance and of charter-parties, is certain. It is natural that it should be hastily assumed that the same antithesis is used when warranty is spoken of in the law of sales; and this assumption is made in some of the extracts quoted, but generally it is made clear if a representation is spoken of as distinguished from a warranty, that what is meant by representation is an expression of opinion as distinguished from an assertion of fact. Only the expression of Crowder, J., in *Hopkins v. Tanqueray*<sup>41</sup> supports the idea that the seller must intend to contract that his representation is true in order to bind

<sup>38</sup> 36 L. T. N. S. 25 [1877].

<sup>39</sup> Id. 26.

<sup>40</sup> See *Behn v. Burnes*, 3 B. & S. 751 [1863]. Anson on Contracts (12th ed.) 335n.

<sup>41</sup> See *supra*, p. 7.



himself as a warrantor. The expressions of the judges in the later case of *Cowdy v. Thomas*<sup>42</sup> strongly support the opposite view.

Even before the decision of this case, Benjamin, in his treatise on the law of sale, had summed up as follows the English law in regard to the intent to warrant requisite to make out a warranty:

"In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment."<sup>43</sup>

This statement, which appears in the first edition of Benjamin's work and in every subsequent edition, was adopted as an accurate statement of the law by the Court of Appeal in *De Lassalle v. Guildford*.<sup>44</sup> Unfortunately, the reporter failed to indicate by quotation marks, or otherwise, that the statement was a quotation from Benjamin, and in *Heilbut v. Buckleton*, Lord Moulton, apparently ignorant where the expression he was criticizing originated, selects it for criticism as a "serious deviation from the correct principle."<sup>45</sup>

The effect of a representation which induces a sale is shown not only by cases involving express representation, but by the whole law of implied warranty. It was not until after it became recognized that an express representation might be a warranty that the law of implied warranty was possible. The foundation for the law of implied warranty of title was laid when Lord Holt decided that a "bare affirmation" by one in possession that the goods sold are his own was sufficient to support an action.<sup>46</sup> It was then easy for the law to take the further step (which was not taken, however, until the nineteenth century), that any sale of chattels by one in possession carried with it an implied warranty of title unless the circumstances were such as to make it clear that the seller merely purported to sell such interest as he had or could convey.<sup>47</sup> The only basis for such a doctrine is that the seller necessarily represents by the mere proposal to sell that he has title.

<sup>42</sup> See *supra*, pp. 8-9.

<sup>43</sup> Benjamin, *Sale*, (1st ed.) 454.

<sup>44</sup> [1901] 2 K. B. 215, 221.

<sup>45</sup> *Heilbut v. Buckleton*, [1913] A. C. 30, 50.

<sup>46</sup> *Medina v. Stoughton*, 1 Ld. Raym. 593, s. c.; 1 Salk. 210, 1795.

<sup>47</sup> See *Eichholz v. Bannister*, 17 C. B. N. S. 708 [1864].

The law of implied warranty of quality has had a similar history. It had become established by the early part of the nineteenth century, as already shown, that a representation of quality by a seller to induce a sale amounted to a warranty. In 1842 the first case was decided which clearly held that on the sale of a specific chattel a warranty of quality might be implied without any express promise or representation by the seller.<sup>48</sup> The case related to the sale of a specific barge which proved inadequate for the buyer's purpose of carrying cement. The court held that though there was no warranty that the barge was fit to carry cement, there was an implied warranty that the barge was reasonably fit for use as an ordinary barge. It is perfectly clear that the seller's contract was to sell the specific barge in regard to which the parties were negotiating. The only basis for imposing a liability as warrantor upon the seller is his implied representation that the specific thing which he seeks to sell is merchantable. It is impossible to analyze the situation so as to find a real promise of quality, either express or implied in fact. The obligation is one imposed by law, not by mutual assent, and the reason for imposing it is because the buyer is justified in believing that a manufacturer (or sometimes a dealer) by the very act of offering his goods for sale, asserts or represents that they are merchantable articles of their kind. The decision just referred to has been regarded as unquestioned law ever since it was decided. The same point is involved in a decision of the Court of Appeal in 1910.<sup>49</sup> In that case the plaintiffs had bought of the defendants "the 24/40 H. P. Fiat Omnibus . . . which we inspected." It was held that there was an implied obligation on the part of the seller that the omnibus should be of merchantable quality.<sup>50</sup> It will be seen that the parties here were dealing with regard to a specific omnibus which had been inspected by the buyer.

The case is in no way different when the buyer orders goods of a certain description, and the seller, without having entered into any previous contract binding him to furnish goods of the description requested, offers specific goods to the buyer which the latter accepts. It may be thought that such a bargain contains the elements

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<sup>48</sup> *Shepherd v. Pybus*, 3 M. & G. 868 [1842].

<sup>49</sup> *Fiat Motors, Limited, v. Bristol Tramways, etc. Co.*, L. R. [1910] 2 K. B. 831.

<sup>50</sup> See another case of implied warranty of specific goods in *Irish v. Russell*, L. R. Irish [1902] 2 K. B. 585.



of a contract by the seller that the goods shall fulfil the description, but on reflection it will be seen that this is not so. There is merely a representation implied in fact, though none the less real, that the goods produced and offered are of the kind requested. Whereupon, relying upon that representation, the buyer assents to become the owner of the specific goods produced.

A recent English case<sup>51</sup> of this sort affords an interesting comparison with the late decision of the House of Lords. In the earlier case the buyer of a rubber hot-water bottle, which broke when in use, sued the seller for breach of warranty and recovered. In that case the plaintiff asked for a rubber bottle. In *Heilbut v. Buckleton* the plaintiff asked for shares in a rubber company. In both cases, in response to a request for something which conformed to a given description, specific goods were produced and mutual assent to the sale of that specific thing followed. In neither case did the thing furnished justify the inferences naturally to be drawn from the description.

It should be observed that the sale of shares is not a sale of goods within the meaning of the English Sale of Goods Act, but there is no reason to suppose that express warranties of choses in action and of goods are to be differently defined. Certainly there is nothing in the language of the opinions in *Heilbut v. Buckleton* to suggest a difference. On the contrary, the reasoning and authorities cited in that case indicate that the court regarded the decision as involving the definition of express warranty in the sale of goods.

An interesting case to compare with *Heilbut v. Buckleton* is *Starkey v. Bank of England*,<sup>52</sup> decided by the House of Lords only ten years ago. In that case the defendant, a stockbroker, presented on behalf of a customer in good faith to the Bank of England a power of attorney, which purported to be signed by the owner of certain consols. On the faith of this power of attorney the bank transferred the consols to a third person. One of the signatures to the power of attorney was forged, and the bank, being liable to the original owner of the consols for making the transfer, sued the stockbroker. Recovery was allowed on the ground that since the bank acted "on the representation that the agent had the authority of the principal, that does import an obligation — the contract being

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<sup>51</sup> *Preist v. Last* [1903] 2 K. B. 148 C. A. See also *Allan v. Lake*, *supra*, p. 6.

<sup>52</sup> [1903] App. Cas. 114.

for good consideration — an undertaking on the part of the agent that the thing which he represented to be genuine was genuine. That contains every element of warranty.”<sup>53</sup> In other words, the doctrine that the representation express or implied of an agent that he has authority to act amounts to a warranty is accepted by the House of Lords, but the much older and more firmly established doctrine that a representation by a seller inducing the sale of goods amounts to a warranty is now denied.<sup>54</sup> That good old doctrine for the encouragement of trade, known as *caveat emptor*, has received no such support for many years.

*Samuel Williston.*

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<sup>53</sup> [1903] App. Cas. 118, per Lord Halsbury.

<sup>54</sup> It is interesting to note that this doctrine of agency is barely half a century old, having been first established by *Collen v. Wright*, 7 E. & B. 301, 8 E. & B. 647 [1857].



## THE MINNESOTA RATE CASES

WALTER BAGEHOT has said that "a constitution is a collection of political means for political ends, and if you admit that any part of a constitution does no business, or that a simpler machine would do equally well what it does, you admit that this part of the constitution, however dignified or awful it may be, is nevertheless in truth useless."<sup>1</sup> While it cannot be said that any part of our federal Constitution "does no business," it can be affirmed that there are three of its organs that are now doing so much more than any other that each stands forth as a distinct force incased in a distinct and growing literature of its own. Around the Contract clause of the Constitution a distinct literature has grown up whose beginnings are to be found in the Dartmouth College case. Around the first section of the Fourteenth Amendment a distinct literature has grown up whose beginnings are to be found in the Slaughter House cases. Around the Commerce clause, which vests in Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes," a distinct literature has grown up whose beginnings are to be found in the famous case of *Gibbons v. Ogden*, in which the power of Congress to regulate commerce was first defined. It is no exaggeration to say that the three great streams of judge-made law which have been for a long time flowing from the Supreme Court into our national life through the three channels just defined have been and are the unifying and systematizing forces that have made a real national life possible. Through their reciprocal action has been realized Marshall's dream:

"That the United States form, for many and for most important purposes, a single nation has not yet been denied. In war we are one people. In making peace we are one people. In all commercial relations we are one and the same people. In many other respects the American people are one. And the government which is alone capable of controlling and managing their interests in all these respects is the

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<sup>1</sup> Bagehot, *The English Const.* 4.

government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme. It can, then, in affecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire, — for some purposes sovereign, for some purposes subordinate.”<sup>2</sup>

Within the domain of reserved state powers is included, said the great Chief Justice,

“that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State.”<sup>3</sup>

That reserved power of a state to regulate its internal commerce has recently received a notable and far-reaching recognition in the unanimous judgment rendered by the Supreme Court of the United States, speaking through Mr. Justice Hughes, in the Minnesota Rate Cases; wherein it was held that, subject to certain limitations,

“there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending federal intervention. . . . Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred

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<sup>2</sup> *Cohens v. Virginia*, 6 Wheat. [U. S.] 264 [1821].

<sup>3</sup> *Gibbons v. Ogden*, 9 Wheat. [U. S.] 1 [1824].



by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of federal power. . . . And whenever, as to such matters, under these established principles, Congress may be entitled to act, by virtue of its power to secure the complete government of interstate commerce, the state power nevertheless continues until Congress does act and by its valid interposition limits the exercise of the local authority. (2) These principles apply to the authority of the state to prescribe reasonable maximum rates for interstate transportation. . . . If this authority of the state be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dominant federal power; that is, one which has not been exerted, but can only be found in the actual exercise of federal control in such measure as to exclude this action by the state which otherwise would clearly be within its province. . . . The question we have now before us, essentially, is whether after the passage of the interstate commerce act, and its amendment, the state continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. That, as it plainly appears, was the nature of the action taken by Minnesota, and the attack, however phrased, upon the rates here involved as an interference with interstate commerce, is in substance a denial of that authority."

In solving the weighty problem thus submitted to it, the court recognized the fact that "The controversy thus arises from opposing conceptions of the fundamental law, and of the scope and effect of federal legislation, rather than from differences with respect to salient facts." Those who represented the state contended that "there is practically no movement of traffic between two towns within a state that does not come into competition with some interstate haul," and that "if the disturbance of the existing relation between competitive state and interstate rates is the correct criterion, no reduction can be made in state rates without interfering with interstate commerce." They assailed the decision of the court below, not upon the ground that it incorrectly set forth

the conditions in Minnesota and adjoining states, but because of "its plain disregard of the provisions of the federal Constitution, which establish the relations between the nation and the state." The operation of such provisions, they maintained, "was not made to depend upon geography or convenience or competition. They cannot apply in one state and not in another, according to circumstances as they may be found by the courts, because they are vital principles which constitute the very structure of our dual form of government." In that way the court was forced to begin its opinion with a review of the history of the commerce clause of the Constitution, the product of a hopeless condition which "sprang from the disastrous experiences under the confederation, when the states vied in discriminatory measures against each other." Who can doubt that against such mighty forces, all making for disunion, the new national spirit embodied in the existing constitution would have been powerless, despite its nationalizing machinery operating directly on individuals, had it not been for the unifying force of rapid intercommunication? Without the steamboat, the locomotive engine, and the telegraph, existing conditions would have been impossible. A revolution was wrought in the travel and commerce of this country through a transition from the primitive and ineffectual means of transportation by pack-horse, stage, and wagon to the new methods resulting from the application of steam to locomotion on land as well as water. When in 1824 the time came for the Supreme Court to construe the commerce clause in the famous case of *Gibbons v. Ogden*, it appeared that Chancellor Kent had granted an injunction restraining Gibbons from navigating the Hudson River by steamboats only licensed for the coasting trade under an act of Congress, on the ground that he was thereby infringing the exclusive right granted by the state of New York to Robert Fulton and Livingstone, and by them assigned to Ogden, to navigate all the waters of the state with vessels moved by steam. But that claim in favor of monopoly backed by state power went down before a judgment holding that Congress had exclusive authority to regulate commerce in all its forms, on all the navigable waters of the United States, including bays, rivers, and harbors; free from monopoly, restraint, or interference by state legislation; that the term "commerce" meant, not only traffic, but intercourse; that it included navigation; therefore the power to regulate com-



merce included the power to regulate navigation. It was admitted that it did not include commerce purely internal; and the point was left undecided whether the power of Congress to regulate commerce was exclusive only when exercised, or whether a state might exercise it in the absence of action by Congress. Thus was established "that freedom of commerce between the states," which, in the words of Mr. Justice Brewer, "perhaps more than any one thing, has wrought into the minds of the people the great thought of a single controlling nationality." In 1847 arose the License Cases,<sup>4</sup> in the first two of which the construction of the commerce clause was involved with the question whether, in the presence of an act of Congress authorizing the importation from foreign countries of wines and spirits, a state might assume to prohibit or regulate their sale at retail; and in the last with the question whether, in the absence of an act of Congress to regulate such importation, a state might prohibit by law the sale of liquor imported from another state. In the last, a diversity of opinion arose as to the question whether, in the absence of an act of Congress regulating commerce between the states, all state laws on the subject were null and void. In other words, whether the mere grant of power to Congress could be construed an absolute prohibition of the exercise of any power over the same subject by the states. Despite such a grant, in the opinion of the Chief Justice, "the state may nevertheless, for the surety and convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid, unless they come in conflict with the laws of Congress." The decision in *Pierce v. New Hampshire* was, however, distinctly overruled in *Leisy v. Hardin*,<sup>5</sup> known as the Original Package case, in which it was held that, as the grant of power to regulate commerce among the states is exclusive, "the states cannot exercise that power without the assent of Congress; and in the absence of legislation, it is left to the courts to determine when state action does or does not amount to such exercise, or in other words, what is or is not a regulation of such commerce." In *Cooley v. Port Wardens*<sup>6</sup> a Pennsylvania statute regulating

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<sup>4</sup> *Thurlow v. Mass.*, 5 How. [U. S.] 504.

<sup>5</sup> 135 U. S. 100 [1889].

<sup>6</sup> 12 How. [U. S.] 300 [1851].

pilots and pilotage, and providing that a vessel neglecting or refusing to take a pilot should pay and forfeit certain sums to a society for the relief of pilots, was held not to be in conflict with the article of the Constitution prohibiting states from imposing imposts and duties on imports, exports, and tonnage, because those subjects are distinct from fees and charges for pilotage, and from the penalties by which commercial states enforce their pilotage laws. In 1877 the Supreme Court, in citing and still further developing the principles announced in *Gibbons v. Ogden* fifty-three years before, held in *Pensacola Teleg. Co. v. Western Union Teleg. Co.*,<sup>7</sup> that a telegraph company bears the same relation to commerce as a carrier of goods, and that the powers of Congress are not confined to the instrumentalities of commerce known or in use when the Constitution was adopted.

Such were the landmarks defining the separate domains of intra-state and interstate commerce prior to the enactment of "An Act to regulate commerce," approved February 4, 1887, by which the Interstate Commerce Commission was created. When that Act was passed the case of *California v. Central Pacific R. Co.*<sup>8</sup> was pending, in which was finally settled the right of Congress to grant charters for the construction of railroads in any state without its consent, a right never asserted prior to the act to facilitate commercial, postal, and military communication among the several states, approved June 15, 1866. By that Act was greatly accelerated the process through which commerce, including transportation, has been revolutionized by the establishment and rapid growth of inland facilities of distribution and sharpness of competition between trade centers, incident to the annihilation of distance through the increased speed of trains, as well as by the greatly increased capacity of engines and cars. It was the establishment of the great railway systems of continuous lines, unknown in the first decade of railway construction, that forced Congress in 1887 to organize the regulating power which down to that time lay practically dormant. In the first case in which the act of 1887 was construed, the court said that prior to its enactment,

"railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more

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<sup>7</sup> 96 U. S. 1 [1877].

<sup>8</sup> 127 U. S. 1 [1887].



than that they should carry for all persons who applied in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service."

In *Reagan v. Farmers' Loan & Trust Co.*<sup>9</sup> it was held that although the formation of a tariff of charges for transportation by a common carrier is a legislative or ministerial rather than a judicial function, the court may decide whether or not such rates are unjust and unreasonable and such as to work a practical destruction of rights of property, and if found so to be may restrain their operation; that the fixing and enforcement by a railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstitutional denial of the equal protection of the laws; that a schedule of rates made by railroad commissioners being challenged as a whole, the court must either condemn or sustain it as a whole and cannot rearrange it or prepare a new schedule. After the commission had undertaken during many years to prescribe rates for the future, under the terms of the original Act, its right to do so was questioned, and the Supreme Court held it had no such right.<sup>10</sup> The conclusion of the court was condensed into the statement that "it is one thing to inquire whether the rates which have been charged and collected are reasonable, — that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future, — that is a legislative act."

In *Louisville, N. O. & T. R. Co. v. Mississippi*<sup>11</sup> the line between interstate and intrastate commerce was thus drawn:

"It has often been held in this court, that there can be no doubt about it, that there is a commerce wholly within the state, which is not subject to constitutional provision, and the distinction between commerce among the states and the other class of commerce between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the two."

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<sup>9</sup> 154 U. S. 362 [1893].

<sup>10</sup> *Interstate Commerce Com. v. Baltimore & O. R. Co.*, 145 U. S. 263 [1891].

<sup>11</sup> 133 U. S. 587 [1889].

Reference is then made to *Stone v. Farmers' Loan & Trust Co.*,<sup>12</sup> in which it was held that a state has power to limit railroad charges for transportation within its own jurisdiction, unless restrained by contract, or the power of Congress to regulate foreign or interstate commerce; and that the power can only be bargained away, if at all, by words of positive grant, or their equivalent. In *Munn v. Illinois*,<sup>13</sup> defining the extent of a state's police power, a statute of that state fixing the maximum charges for the storage of grain in warehouses in Chicago and other places in the state was held valid, as a mere common-law regulation of trade or of business, not in violation of the limitations upon the legislative power of the state imposed by the federal Constitution. An important statement of the relation between the police power of a state and the power of Congress to regulate interstate commerce is contained in *Louisville & N. R. Co. v. Kentucky*,<sup>14</sup> wherein it was held that the prohibition by a state of the consolidation of parallel and competing lines of railway is not interference with the power of Congress over interstate commerce. In *Pullman Co. v. Adams* <sup>15</sup> it was held that the privilege tax imposed by Mississippi on sleeping and palace car companies carrying passengers from one point to another within the state cannot be deemed an unconstitutional regulation of commerce. In *Patapsco Guano Co. v. North Carolina Board of Agriculture* <sup>16</sup> it was held that interstate as well as foreign commerce is subject to state inspection laws. In *Crossman v. Lurman* <sup>17</sup> it was held that the New York statute forbidding the sale of adulterated food and drugs is not repugnant to the commerce clause, but is a valid exercise of the police power of the state. In *Bartemeyer v. Iowa* <sup>18</sup> it was held that the right to sell intoxicating liquors is not one of the privileges and immunities of a citizen of the United States which, by the Fourteenth Amendment, a state is forbidden to abridge; and at a little later day it was held in *Mugler v. Kansas* <sup>19</sup> that a state law prohibiting the manufacture within its limits of intoxicating liquors, to be sold and bartered for general use as a beverage, was not necessarily an infraction of the Constitution, because the Fourteenth Amendment does not deprive a state of

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<sup>12</sup> 116 U. S. 307 [1885].

<sup>14</sup> 161 U. S. 677 [1895].

<sup>16</sup> 171 U. S. 345 [1897].

<sup>18</sup> 18 Wall. [U. S.] 129 [1873].

<sup>13</sup> 94 U. S. 113 [1876].

<sup>15</sup> 189 U. S. 420 [1901].

<sup>17</sup> 192 U. S. 189 [1903].

<sup>19</sup> 123 U. S. 623 [1887].



the police power to determine primarily what measures are needful for the protection of the public morals, health, and safety. Thus it appears that the exclusive power of the federal government to regulate interstate commerce has not annihilated the power of the state (1) to exercise its police power, within proper limits, over all commerce, interstate as well as foreign; (2) to exercise its control, subject to certain limitations, over all commerce really intrastate. In the Act to Regulate Commerce as amended up to June 18, 1910, it is expressly provided

"that the provisions of this Act shall not apply to the transportation of passengers or property, or to receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country or to any state or territory as aforesaid."

Such is the essence of the outcome of a twenty-five years of construction of the Interstate Commerce Act of 1887 at the hands of the commission and the federal courts, all of which must be considered in connection with the amendments made by Congress during that tentative period, so numerous that a mere catalogue of their titles occupies two printed pages octavo. In that vast literature, consisting of statutes and judge-made law, nothing is more lucid, more practical, than the following statement made by Mr. Justice Field in his concurring opinion in *Bowman v. Chicago & Northwestern R. Co.*,<sup>20</sup> in which he thus runs the line between state and federal power:

"That when the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until Congress interfere and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the impor-

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<sup>20</sup> 125 U. S. 465 [1887].

tation of goods from one state to another, Congress can alone act upon it, and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the state shall be unrestricted. It is only after the importation is completed, and the property is mingled with and becomes a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

After a minute and masterful review of the supreme power vested in Congress to regulate commerce, foreign and domestic, prior and subsequent to the "Act to Regulate Commerce," approved February 4, 1887, the court in the Minnesota Rate Cases declared with all possible emphasis that, from the beginning, the fact has always been recognized

"that there is a commerce wholly within the state, which is not subject to the constitutional provision, and the distinction between commerce among the states and the other class of commerce between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized."

In its review of that branch of the case, the court took occasion to say that state regulation of railroad rates began with railroad transportation. That the authority of the state to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grounds of corporate privileges; that it became a frequent practice for the states to create commissions, as agencies of state supervision and regulation, and in many instances the rate-making power was conferred upon such bodies; that while the authority of the state could not be extended to the regulation of charges for interstate commerce, its authority to "fix reasonable intrastate rates through its own territory" was put beyond all question; that it has never been doubted that the state could, if it saw fit, build its own highways, canals, and railroads; that it could build railroads traversing the entire state, and thus join its border cities and commercial centers by new highways of internal intercourse,



to be always available upon reasonable terms; and above all it held that

"Such provision for local traffic might indeed alter relative advantages in competition, and, by virtue of economic forces, those engaged in interstate trade and transportation might find it necessary to make readjustments, extending from market to market through a wide sphere of influence; but such action of the state would not for that reason be regarded as creating a direct restraint upon interstate commerce, and as thus transcending the state power. . . . As a power appropriate to the territorial jurisdiction of the state, it is not confined to a part of the state, but extends throughout the state, — to its cities adjacent to its boundaries as well as to those in the interior of the state. To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact."

After having thus defined, with minute precision, the ultimate question before it, the court solved it in these terms:

"To suppose, however, from a review of these decisions, that the exercise of this acknowledged power of the state may be permitted to create an irreconcilable conflict with the authority of the nation, or that, through an equipoise of powers an effective control of interstate commerce is rendered impossible, is to overlook the dominant operation of the Constitution, which, creating a nation, equipped it with an authority supreme and plenary, to control national commerce, and to prevent that control, exercised in the wisdom of Congress, from being obstructed or destroyed by any opposing action. But, as we said at the outset, our system of government is a practical adjustment by which the national authority, as conferred by the Constitution, is maintained in its full scope without unnecessary loss of local efficiency. It thus clearly appears that, under the established principles governing state action, the state of Minnesota did not transcend the limits of its authority in prescribing rates here involved, assuming them to be reasonable intrastate rules. It exercised an authority appropriate to its territorial jurisdiction, and not opposed to any action thus far taken by Congress."

Such was the path by which the court reached the following conclusions: first, that the failure of Congress to act on the subject leaves each state free to establish maximum intrastate rates for interstate carriers which are reasonable in themselves, although

the state's requirements may necessarily disturb the existing relation between intrastate and interstate rates as to places within zones of competition crossed by the state boundary line;<sup>21</sup> second, that the states continued to possess the right to prescribe reasonable rates for the exclusively internal traffic on interstate carriers after the passage of the interstate commerce act of 1887, and the amendment of June 29, 1906, although it may be that by reason of the interblending of the interstate and intrastate operations of such carriers adequate regulation of interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former; third, that the question whether an undue or unreasonable preference or advantage to any locality forbidden by the interstate commerce act of 1887 arises from the operation of an intrastate rate as compared with an interstate rate, or whether any locality is thereby subjected to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission, and not for the courts, — assuming that such a case is within the statute. The status thus defined by existing laws, state and federal, says the court, is

*"not opposed to any action thus far taken by Congress. . . . It is the function of this court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of federal action, may we deny effect to the laws of the state enacted within the field which it is entitled to occupy, until its authority is limited through the exertion by Congress of its paramount constitutional power."*

With these emphatic declarations that Congress may, at its pleasure, so exercise "its paramount constitutional power" as to enact "a more comprehensive scheme of regulation" of the entire subject matter, such a scheme as may destroy the entire status as de-

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<sup>21</sup> After referring in its opinion to interstate rates as those "fixed by the carrier for interstate transportation," the court makes a comparison between rates as prescribed by the state authority and those prescribed by the carrier. It then indulges in a presumption of reasonableness as to the state rate on the question of interference, but indulges in no such presumption as to the interstate rate. Considering the supervision of the Interstate Commerce Commission over interstate rates, should there not be a presumption of reasonableness of those rates? The court has been very careful to avoid any clash between the two presumptions.



fined by existing laws, — the court has transferred the problem of problems from the judicial to the political arena. Thus the burden has been cast upon our constructive legislators in Congress to devise such a new interstate commerce act as will be capable of adjusting all of the conflicting interests with which the court says it has no authority to deal. If the state railroad commissions as a whole should undertake to use their freshly defined powers in a radical and drastic spirit, and in such a way as to *disjoint the interstate system of rates as a whole*, a more comprehensive and far-reaching interstate commerce act, occupying the entire domain of federal power as defined by the court, might suddenly become a national necessity. It is therefore difficult to withhold a conjecture as to what would have been the result had the court set aside the state rates as an interference with interstate commerce. Possibly the day will come when such a result will be reached under a new interstate commerce act so drawn as to occupy the entire domain of federal power as the court has defined it.

The form of the judgment as prepared by Mr. Justice Hughes is as admirable as its substance. In it there is a happy blending of the scientific with the practical, of weightiness of thought with perfect lucidity of expression. He states the case with such precision, eliminating all irrelevancies of fact, and bringing out the essential matter in such bold relief in accordance with the legal principles it involves, as to carry conviction by sheer statement without argument. The ex-Governor of New York has seized upon a rare opportunity to erect for himself an enduring monument in a unique body of judicial literature built up by a line of jurists, a few of whom are destined to stand out in the time to come as the peers of Julianus, Gaius, Papinian, Tribonian, Portalis, Mansfield, and Rudolph Sohm.

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## THE EXTENSION OF FEDERAL CONTROL THROUGH THE REGULATION OF THE MAILS.

THE recent decision<sup>1</sup> of the Supreme Court of the United States upholding the constitutionality of the so-called "newspaper publicity law"<sup>2</sup> is of more than passing importance. Popular interest, of course, attaches chiefly to the fact that periodicals, in order to enjoy what the court calls "the exceptional privileges" of second-class rates, must print the semi-annual lists of their editors and stockholders, and mark as an advertisement any reading matter for the publication of which compensation is received. From a legal standpoint, however, the case suggests, but does not decide, several highly important constitutional questions.

As paraphrased in the opinion, the contention of the government was that the law merely "imposes conditions necessary to be complied with to enable publishers to participate in the great and exclusive privileges and advantages which arise from the right to use the second class mail," and that the provision was valid "as an exertion by Congress of its power to establish post offices and post roads, a power which conveys an absolute right of legislative

<sup>1</sup> *Lewis Publishing Co. v. Morgan*, 229 U. S. 288 (June 10, 1913).

<sup>2</sup> 37 Stat. at L. 553, ch. 389. The law requires publications entered as second-class matter (with a few exceptions) to furnish the post-office department and publish "a sworn statement setting forth the names and post-office addresses of the editor, managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months. . . . Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure."

A separate and concluding paragraph of the law provides "That all editorial or other reading matter published in any newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised, without so marking the same, shall, upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500)."



selection as to what shall be carried in the mails, and which therefore is not in any wise subject to judicial control even though in a given case it may be manifest that a particular exclusion is but arbitrary because resting on no discernible distinction nor coming within any discoverable principle of justice or public policy."

The court, however, refuses to accept this view, saying that "because there has developed no necessity of passing on the question, we do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition, embodied in the proposition of the government which we have previously stated."<sup>3</sup>

Nevertheless the case will furnish an excellent text upon which to base a discussion of the extent to which, under the guise of regulating the mails, Federal control can be carried, — a question which has not yet received adequate consideration but which must soon be answered. For, even taking into consideration the close reasoning by which the court justifies the law on the ground that it only "affixes additional conditions for admission to a privileged class of mail," the statute is in reality a regulation of journalism, and by it the federal government accomplishes something indirectly which it could not do directly. And this raises the question of the conclusiveness of the court's attitude, expressed in one case, at least, that the judiciary will not intervene to restrain "the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."<sup>4</sup>

It is my purpose, therefore, in the present paper, to discuss the limits to which "nullification by indirection"<sup>5</sup> may be extended through federal regulation of the mails.

## I. FEDERAL POWER OVER THE MAILS: A REVIEW.

The constitutional grant of the postal power is clothed in words which "poorly express its object" and feebly indicate the particular measures which may be adopted to carry out its design. "To

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<sup>3</sup> Lewis Publishing Co. v. Morgan, *supra*.

<sup>4</sup> McCray v. United States, 195 U. S. 27 (1904).

<sup>5</sup> The phrase is that of Mr. James M. Beck, who in the newspaper case was counsel for the Lewis Publishing Company.

establish Post Offices and post Roads" is the form of the grant; to create and regulate the entire postal system of the government is the evident intent.<sup>6</sup>

Under the authority given in the six words of this clause the government has classified mailable matter, its senders and recipients. Congress has exercised its power (held in all instances to be valid) of excluding articles such as lottery tickets and advertisements, poisons, obscene literature, animals, liquors, etc.; it has put special conditions on the introduction of other articles, and the violation of any of these regulations is dealt with criminally.<sup>7</sup> Finally, persons using the mails with intent to defraud are dealt with by federal authorities.

Such an enormous extension of the postal power, concerning the necessity for which there has been little difference of opinion in Congress, has, of course, been combated in the courts. In his message sent to Congress on the 2d of December, 1835,<sup>8</sup> President Jackson urged the passage of a law prohibiting, "under severe penalties, the circulation in the southern states, through the mail, of incendiary publications intended to instigate the slaves to insurrection." The message was referred to a committee of which Mr. Calhoun was chairman, and while great differences of opinion resulted, the courts were not called upon to render a decision, for the

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<sup>6</sup> Pomeroy, Constitutional Law, 264. Or, as described by Marshall, "this power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post road, and from one post office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post office or rob the mail." *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

<sup>7</sup> For the extensive *Index Expurgatorius* which has been built up, see "Postal Laws and Regulations" (1902), 59th Cong. 2d Sess. Sen. Doc. No. 394, Pt. I, p. 321, "Un-mailable Matter." It may in this connection be mentioned that the Post Office does an annual business of over five hundred millions of dollars. The second-class mail matter, carried at the rate of one cent a pound, involves an annual loss of seventy millions of dollars. Federal banking activities through the Postal Savings Law and money-order exchanges are outside the purview of this paper. For a discussion of the post office as a common carrier and bank, see 18 American Law Review, 281, and for an argument that Congress, under the postal grant, has the power to acquire and operate the railroads, see Edgar H. Farrar's brief in "Hearings before Committee on Interstate Commerce, United States Senate, 62d Congress," p. 1498. The Supreme Court, moreover, has partially relied on the postal clause to justify the acts of Congress incorporating certain railroad companies. See *California v. Pacific Railroad Companies*, 127 U. S. 1 (1887).

<sup>8</sup> II Statesman's Manual, 1018.



Senate concluded that Congress did not have such a power of exclusion and defeated the proposed law.<sup>9</sup>

The issue was not squarely raised until 1878, when the Supreme Court upheld an act of Congress<sup>10</sup> making it a crime for anyone knowingly to send through the mails any letter or circular concerning lotteries. The court said:<sup>11</sup>

"The validity of legislation prescribing what should be carried, and its weight and form and the charges to which it should be subjected, has never been questioned. . . . The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded."

Twelve years later, in sustaining the anti-lottery act of 1890<sup>12</sup> the court reaffirmed this ruling and held "that the power vested in Congress to establish post-offices and post-roads embraced the regulation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mails and what excluded; that in excluding the various articles from the mails the object of Congress is . . . to refuse facilities for the distribution of matter deemed injurious by Congress to the public morals."<sup>13</sup>

Still greater power was recognized with reference to the so-called "fraud orders," the court holding that Congress "may refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employees or injurious to other mail matter. . . . While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefit of its postal service, and deny it to another person in the same class and standing in the same relation to the government, it does not follow that under its power to classify mailable matter, applying different rates of post-

<sup>9</sup> XII Debates of Congress, 704, 754, 771; V Calhoun's Works, 191.

<sup>10</sup> Revised Statutes, § 3894.

<sup>11</sup> *Ex parte Jackson*, 96 U. S. 727 (1878).

<sup>12</sup> 26 Stat. at L. 465.

<sup>13</sup> *In re Rapier*, 143 U. S. 110 (1892). In the Jackson case, however, the court says that "the difficulty attending the subject arises, not from the want of power in Congress to prescribe the regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail."

age to different articles, and prohibiting some altogether, it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception, or the dissemination among its citizens of information of a character calculated to debauch public morality.”<sup>14</sup>

A sweeping power in Congress has, therefore, been recognized, but in every instance its exercise has been direct. The laws which have been passed were aimed at the articles themselves on the ground that they were fraudulent, immoral, or dangerous; they were excluded from the mails, and persons violating this regulation are dealt with criminally. But Congress has not yet attempted to prevent the issuance of lottery tickets or the publication of obscene literature; it has simply refused to lend encouragement to immorality by permitting the use of a federal agency.<sup>15</sup>

## II. THE NEWSPAPER LAW AND ITS JUSTIFICATION.

It is evident that the “newspaper publicity law” set forth at the beginning of this paper is legislation of a character different from that upheld by the Supreme Court in the decisions which have been quoted. As claimed in the defendants’ briefs, the law was designed “to regulate journalism.” Relying upon its power over the mails, Congress threatened those publications which enjoy second-class rates with a denial of this privilege should they refuse to comply with certain conditions; and, moreover, it was made a crime to continue to use the second-class rates and violate the stipulation that all reading matter for the publication of which a valuable consideration is received “shall be plainly marked ‘advertisement.’” Such regulations, without any reference to the

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<sup>14</sup> Public Clearing House v. Coyne, 194 U. S. 497 (1904). This case also decided that the power to determine whether a fraudulent use was being made of the mails could be delegated by Congress to the Postmaster General.

<sup>15</sup> The Supreme Court has held that no distinction can be drawn between *mala prohibita* and *mala in se*. (*In re Rapier*, *supra*.) It was argued that the mails could not be used to promote murder, arson, etc. (*mala in se*), but that, on the other hand, Congress had not equal power with regard to matters which it might *declare* criminal (*mala prohibita*). But, said the court, “it would be for Congress to determine what are within and what without the rule.” Our present inquiry, however, is not concerned with this phase.



use of the mails, would be obviously outside the constitutional power of Congress.

By the narrow, but nevertheless convincing, line of reasoning just indicated, the Supreme Court, through Chief Justice White, justified the law without being put to the necessity of making any definite declaration as to the limits to which Congress may go in its exercise of what, lacking a better phrase, we may call "indirect regulation under the postal power."

The court's opinion shows that in the classification of mail matter there has been no attempt at uniformity, and that periodical publications have enjoyed special favors by reason of legislative adherence to what has been described as "the historic policy of encouraging by low postal rates the dissemination of current intelligence."<sup>16</sup> It is shown that as a condition precedent to being "entered as second-class mail matter," and enjoying the low rates which are maintained at a loss, the government demands answers to a score of questions concerning ownership, editorial direction, advertising discrimination, specimen copies, and circulation. To the Third Assistant Postmaster General is given the authority of accepting or rejecting applications for entry at the second-class rate.<sup>17</sup> The Supreme Court simply looked upon the "newspaper law" as laying down new conditions, compliance with which will continue the right "to enjoy great privileges and advantages at the public expense." Part of the opinion makes this clear:

"As the right to consider the character of the publication as an advertising medium was previously deemed to be incidental to the exercise of the power to classify for the purpose of the second-class mail, it is impossible in reason to perceive why the new condition as to marking matter, which is paid for as an advertisement is not equally incidental to the right to classify. And the additional exactions as to disclosure of stockholders, principal creditors, etc., also are as clearly incidental to the power to classify as are the requirements as to disclosure of ownership, editors, etc., which for so many years formed the basis of the right

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<sup>16</sup> "Report of the Commission on Second-Class Mail Matter," 143. In his message of February 22, 1912, transmitting this report to Congress, President Taft said: "The findings of the commission confirm the view that the cost of handling and transporting second-class mail matter is greatly in excess of the postage paid, and that an increase in the rate is not only justified by the facts, but is desirable."

<sup>17</sup> "Postal Laws and Regulations" (1902), p. 198.

of admission to the classification. We say this because of the intimate relation which exists between ownership and debt; since debt, in its ultimate conception, is a dismemberment of ownership, and the power which it confers over an owner is, by the common knowledge of mankind, often the equivalent of the control which would result from ownership itself.

"Considered intrinsically, no completer statement of the relation which the newly exacted conditions bear to the great public purpose which induced Congress to continue, in favor of the publishers of newspapers, at vast expense, the low postal rate as well as other privileges accorded by the second-class mail classification can be made than was expressed in the report of the Senate committee, stating the intent of the legislation which we have already excerpted; that is, to secure to the public in 'the dissemination of knowledge of current events,' by means of newspapers, the names not only of the apparent, but of what might prove to be the real and substantial owners of the publications, and to enable the public to know whether matter which was published was what it purported to be, or was in substance a paid advertisement.

"We repeat that in considering this subject we are concerned not with any general regulation of what should be published in newspapers, not with any condition excluding from the right to resort to the mails, but we are concerned solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public expense, — a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded."<sup>18</sup>

### III. PROPOSED EXTENSIONS OF THE POSTAL POWER.

It may be said, therefore, that the latest pronouncement of the Supreme Court lends little if any support to the doctrines of those who contend that under the post-roads clause Congress may extend federal control to limits which are almost unassignable. Let us examine some of these proposals.

It is, for instance, urged "that Congress prohibit the transmission by the mails or by telegraph or telephone from one State to another of orders to buy or sell or quotations or other information concerning transactions on any stock exchange, unless, among

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<sup>18</sup> *Lewis Publishing Co. v. Morgan, supra.*



other conditions, such exchange shall (1) be a body corporate of the State or Territory in which it is located."<sup>19</sup>

A similar exercise of the postal power is advocated to secure corporate publicity since "Congress, by regulating the use of the mails and channels of interstate commerce, may compel every corporation engaged in any business, *whether interstate or not*, to give publicity to its corporate affairs, by legislation denying the use of the mails and the instruments of interstate commerce for the transmission of any matter concerning the affairs or business of any corporation that fails to make and file reports of the fullest nature concerning its organization and business, such, for example, as are already exacted from the interstate carriers under the Interstate Commerce Act. Such legislation would be valid and enforceable."<sup>20</sup>

It has also been suggested in Congress that an effective punitive method of dealing with monopolistic corporations would be to deny them postal facilities. If such corporations were violating the Sherman Act or were otherwise outlawed by valid legislation, a denial of the use of the mails would be justifiable if not constitutional. It would be manifestly absurd for the general government to aid subjects of its regulation in a violation of laws which it has passed. An analogous case is afforded by the provision of the Panama Canal Act of August 24, 1912, which says that no vessel owned by any company doing business in violation of any of the acts of Congress relating to interstate commerce "shall be permitted to enter or pass through said canal."

Such regulations, like that forbidding the use of the mails to defraud, are obviously different from that proposed by the Money Trust Committee. A law requiring that stock exchanges must have state charters as an antecedent to doing business would be *ultra vires* and thus unconstitutional; but it is being urged that Congress has the power indirectly to accomplish this very end. In other words, under the guise of passing legislation ostensibly based upon the postal clause of the Constitution, Congress, it is claimed,

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<sup>19</sup> "Majority Report of the Committee appointed to investigate the Concentration of Control of Money and Credit," Washington, February 28, 1913, p. 162. A bill embodying these recommendations is given on p. 170.

<sup>20</sup> Max Pam, "Powers of Regulation Vested in Congress," 24 HARV. L. REV. 77, 99. Italics in the original.

may indefinitely extend its control and encroach upon the reserved rights of the states.

If such a theory is correct, it is not too much to say that powers as great as those delegated in 1787 to the federal government, when in order to form a more perfect Union the Constitution was agreed to, will, by judicial construction, be taken from the states and given over to the national legislature. For, as it is hardly necessary to remark, the denial of postal and interstate commerce facilities would be almost as efficacious as positive legislation, since, without using the mails and the channels of trade, practically no business could exist. If congressional control may be thus extended, state lines will no longer exist, and the Tenth Amendment to the Constitution reserving the undelegated powers to the states or to the people will become a practical nullity.<sup>21</sup>

#### IV. "NULLIFICATION BY INDIRECTION."

In the exercise of its taxing power, and less noticeably in its control of interstate commerce, Congress has been able indirectly to accomplish ends which were not included in the enumerated delegations when the Constitution was adopted. Thus, the tax on state bank notes was upheld on the ground that "the judiciary cannot prescribe to the legislative departments of the government limitations upon the exercise of its *acknowledged* powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."<sup>22</sup>

Such a position, however, was easily justifiable on the ground that Congress had the power to stop the issue of state bank notes altogether if it thought this course necessary in order to provide an effective currency system, and the case thus loses much of its apparent importance.<sup>23</sup> More illustrative perhaps of the plenary

<sup>21</sup> It has also been urged that Congress may refuse corporations to whose size or organization it objects the right to sue in federal courts and may order national banks to refuse to receive their deposits. It is thus seen that the proposed development of the postal power to limits of doubtful constitutionality is merely one phase of a larger question of indirect government.

<sup>22</sup> *Veazie v. Fenno*, 8 Wall. (U. S.) 533 (1869). Italics are the author's.

<sup>23</sup> In *Edye v. Robertson*, 112 U. S. 580 (1884), the court said that the imposition "was upheld because a means properly adopted by Congress to protect the currency which it had created." The tax, therefore, was not subject to the ordinary rules.



power of Congress with respect to the raising of a revenue and less easy to explain, is the decision upholding such a heavy tax upon oleomargarine that its manufacture was made distinctly unprofitable. Thus, unable directly to regulate the manufacture, Congress achieved the same end through the exercise of its taxing power. The court said:

"The argument when reduced to its last analysis comes to this: that because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of lawful power whenever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department."<sup>24</sup>

Such a statement, it seems to me, is framed in unfortunate language, but, as will appear later, it is not necessarily a contradiction of the reasoning in the bank-note case to the effect that "there are indeed certain virtual limitations arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power [that of taxation] if so exercised as to impair the separate existence and independent self-government of the states *or if exercised for ends inconsistent with the limited grants of power in the Constitution.*"<sup>25</sup>

Not so marked, but nevertheless interesting, illustrations of this "nullification by indirection" are to be found in the interstate commerce legislation of recent years. Congress has assumed a control over the manufacture of food products by establishing standards of purity which must be met before the articles are admitted in interstate commerce.<sup>26</sup> The Mann White Slave Act extends federal control to immorality in the states, and in its decision upholding this law the court frankly admits that the means exerted "may have the quality of police regulations."<sup>27</sup> Proposals are now made to control manufacturing and trading companies, whether interstate or not, by compelling them to take out federal

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<sup>24</sup> *McCray v. United States*, 197 U. S. 27 (1903).      <sup>25</sup> *Veazie v. Fenno*, *supra*.

<sup>26</sup> *Hippolite Egg Co. v. United States*, 220 U. S. 45 (1911).

<sup>27</sup> *Hoke v. United States*, 227 U. S. 308 (1913); 36 Stat. at L. 825.

charters or licenses, and modify their organizations and business practices in accordance with federal regulations before they will be permitted to enjoy the facilities of interstate commerce. It is most strongly urged that the national legislature has the power to control labor conditions within the states, the most desired manifestation being a law putting articles made by children under specified ages in the same class with lottery tickets and impure food.

Up to this time, however, legislation under the commerce clause has developed little necessity for passing on the question whether Congress is approaching the limits of its power, for the indirect control effected by the various acts has been purely incidental in character or its subjects have been connected with interstate commerce. It is quite proper for Congress to build up an *Index Expurgatorius* just as it has done in the case of the mails, and to say that commerce shall not be polluted by the carriage of obscene literature, impure food, and made an agency to promote immorality. In practically every case, the power has not been exerted on *persons*, but on *things*, by reason of their inherent characteristics, and only once has there been any real "nullification by indirection." Here the Supreme Court by a forced interpretation of the statute destroyed much of its force.

I refer to the "commodities clause" of the Hepburn Interstate Commerce Act. This made it unlawful for any railroad to transport, except for its own use, any commodity other than timber, "manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."<sup>28</sup> The court interpreted this as meaning that a railroad could still own stock in a *bonâ fide* corporation engaged in mining, etc., and could itself mine or produce commodities, but that before the transportation of these by the railroad began, the carrier would have to divorce itself of all interest by a real sale. Any other interpretation would have required the court to consider and decide several very "grave constitutional questions."<sup>29</sup> Such legislation as the "commodities clause," however, was "necessary and proper" in order to prevent evasions of the regulations providing for equality of rates, publica-

<sup>28</sup> 34 Stat. at L. 584; 35 Stat. at L. 60.

<sup>29</sup> United States *ex rel.* Atty. Gen. v. Delaware & H. Co., 213 U. S. 366 (1909).



tions of tariffs, etc., which Congress had imposed upon carriers engaged in interstate traffic.<sup>30</sup>

But even if it be constitutional to go much farther, and for Congress to control child labor and industrial corporations, postulating a power of prescribing arbitrary conditions for engaging in interstate commerce,<sup>31</sup> a different question is presented if it attempts to do a similar thing with reference to the mails. We must not lose sight of the almost unlimited nature of the taxing power, which, in Marshall's phrase, is "the power to destroy." Moreover, this power, and that of regulating commerce among the states, are *acknowledged*, while congressional control of the mails and the determination of who shall be permitted to enjoy postal facilities are functions *implied* from the six words in the Constitution. This difference may prove to be all important.

#### V. A LEGITIMATE END.

The rule adopted in the McCray case, even if correct, does not, it seems to me, materially modify Marshall's famous test:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional"; but "should Congress, under pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."<sup>32</sup>

The judiciary very rightly has nothing to do with the mere policy of legislation. When a particular exercise of *lawful* power is unwise, the responsibility of the legislature is to the people alone. But when an issue such as the one described by Marshall is involved, the courts are under a solemn duty to investigate and determine whether the enactment is what it purports to be, or whether it is designed to accomplish an object "not entrusted to the government." It has become almost axiomatic that "a thing may be within the letter of a statute and not within its meaning, and within

<sup>30</sup> See *New York, N. H. & H. R. Co. v. Interstate Com. Com.*, 200 U. S. 361 (1906).

<sup>31</sup> That the federal legislature has such a power over interstate commerce is, I think, by no means settled.

<sup>32</sup> *McCulloch v. Maryland*, *supra*.

its meaning though not within its letter. The intention of the lawmaker is the law,"<sup>33</sup> and to determine what this intention is the courts will resort to extrinsic evidence.

If Congress should see fit to pass a law denying stock exchanges the use of the mails unless they possess state charters, would it not be incumbent upon the courts, the intent of the statute being all important, to look at the substance of things, and determine whether the law was simply a postal regulation and thus valid, or whether it was an attempt to legislate concerning subjects which by the terms and spirit of the Constitution were meant to remain exclusively under state control? The Supreme Court has often made such an examination.

To take a recent instance, it considered at length the legislative history of the newspaper publicity law in order to show that the last and separate paragraph was not a distinct regulation, unrelated to the privileges of the second-class mail, and held that the report of the Senate committee showed conclusively "that there was no purpose to disintegrate the provision as it passed the House of Representatives, by making two enactments, or to do anything more than to exact additional conditions for the right to enjoy the second-class mail privileges." To make this clear, the court quoted from the committee's report.<sup>34</sup>

This theory of constitutional construction was given even more emphasis in another case:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."<sup>35</sup>

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<sup>33</sup> *Smythe v. Fisk*, 23 Wall. (U. S.) 374 (1874), cited with approval in *Hawaii v. Mankichi*, 190 U. S. 197 (1903).

<sup>34</sup> *Lewis Pub. Co. v. Morgan*, *supra*. Previously, in the same connection, the court remarked that "expressions in the debate, *upon concession for the sake of argument* that they are competent to be looked at," would not modify the view arrived at. See also *United States v. Press Publishing Co.*, 219 U. S. 1 (1911).

<sup>35</sup> *Mugler v. Kansas*, 123 U. S. 623 (1887).



No power ought to be sought, much less adjudged, "in favor of the United States, unless it be clearly within reach of its constitutional charter." The courts are "not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution."<sup>36</sup>

The court has, moreover, adhered to "the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. . . . Constitutional provisions," adds Justice Brewer, "whether operating by way of grant or limitation, are to be enforced according to their letter and cannot be evaded by any legislation which, though not in terms trespassing upon the letter and spirit, yet in substance or effect destroys the grant or limitation."<sup>37</sup>

Sparingly, yet unhesitatingly, the Supreme Court has exercised its power of restraining the legislature, and, according to a recent compilation,<sup>38</sup> thirty-three statutes have, in whole or in part, been declared invalid. More than twelve of the laws were nullified on the ground that they encroached upon the powers reserved to the states and thus were *ultra vires*. None of these precedents, however, is on all fours with the issue which would be presented should Congress attempt to exercise its power over the mails for one of the ends already described. In all of the cases it was the positive, direct power which was denied because not vested in Congress.

Under the war amendments to the Constitution, Congress was held to have the right to pass only "corrective legislation"; "every valid act of Congress must find in the Constitution some warrant for its passage," said the court in one case.<sup>39</sup> Nor was the federal

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<sup>36</sup> *Houston v. Moore*, 5 Wheat. 1 (1820).

<sup>37</sup> *Fairbank v. United States*, 181 U. S. 283 (1901). In *Union Bridge Co. v. United States*, 204 U. S. 364 (1907), this language was used: "If the means employed *have no substantial relation* to public objects which the government may legally accomplish, if they are arbitrary and unreasonable beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

<sup>38</sup> B. F. Moore, "The Supreme Court and Unconstitutional Legislation," 54 *Columbia Univ. Studies*, No. 2, 77.

<sup>39</sup> *United States v. Harris*, 106 U. S. 629 (1883). See also *United States v. Fox*, 95 U. S. 679 (1877), *United States v. Reese*, 92 U. S. 214 (1875), and *James v. Bowman*, 190 U. S. 127 (1902).

government permitted under the Internal Revenue Act of 1867 to regulate the sale of certain inflammable oils.<sup>40</sup> It was restrained also in regard to its power of taxation.<sup>41</sup> The first Employers' Liability Act was overruled because the line between *intra* and *inter* state commerce was not distinctly drawn.<sup>42</sup> Nor was Congress permitted, under its power of regulating foreign commerce, to make it a crime for anyone to harbor for immoral purposes an alien woman within three years of the time of entrance into this country: Such legislation, said the court, showed a tendency "to substitute one consolidated government for the present federal system."<sup>43</sup> Finally, the court has held that "there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part."<sup>44</sup>

Counsel in the newspaper case argued ingeniously but unsuccessfully that requiring the publication of the lists of stockholders and editors is a deprivation of property without due process of law, and that the assailed statute abridged the freedom of the press, but the court overruled both of these contentions as being without foundation. The right of the citizen to be secure from unreasonable searches and seizures is another constitutional restriction, and it is of course evident that the extension of the postal power must be accomplished without violating any of these limitations found in the Constitution itself, and which operate whether the power is acknowledged or implied. In particular instances, therefore, it would be an effective bar to the validity of legislation should there be an encroachment upon individual civil rights.<sup>45</sup>

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<sup>40</sup> *United States v. Dewitt*, 9 Wall. (U. S.) 41 (1869).

<sup>41</sup> *The Collectors v. Day*, 11 Wall. (U. S.) 113 (1870); *Pace v. Burgess*, 92 U. S. 372 (1876); *Fairbank v. United States*, 181 U. S. 283 (1901); *Helwig v. United States*, 188 U. S. 605 (1903).

<sup>42</sup> *Employers' Liability Cases*, 207 U. S. 463 (1907). Congress passed a second act drawn to meet the objections of the court and this was upheld in *Second Employers' Liability Cases*, 223 U. S. 1 (1912). See 32 Stat. at L. 232, 35 Stat. at L. 65, and 36 Stat. at L. 291.

<sup>43</sup> *United States v. Keller*, 213 U. S. 138 (1908).

<sup>44</sup> *Adair v. United States*, 208 U. S. 161 (1907).

<sup>45</sup> This was made clear in the Jackson case, *supra*. "But little need be said as to the clause forbidding Congress to pass any law 'abridging the freedom of speech. or of the press,' as that clause has been removed from the Constitution, so far as the mails



In the present discussion the possible effect of such constitutional limitations has not been considered, as the predominating issue has seemed to me to be whether Congress has the right to do indirectly what it has not the power directly to accomplish; whether it may use its authority over the post office, and its implied authority over the mails to extend federal regulation to stock exchanges, and subsequently, if such an exercise is sanctioned, to a thousand other fields now exclusively under the control of the states.

## VI. THE CONSTITUTIONAL LIMIT.

It is thus evident that while a plenary power over the mails has been recognized in Congress, the courts have not indicated that it may be extended to arbitrary limits; in fact, their attitude would seem to support the contrary view. Certain it is that all past exclusions from the mail have had the "quality of police regulations";<sup>46</sup> and while there is no ground upon which to argue the point, it is certainly not illogical to maintain that further exclusions should be of this character only.

The indirect regulation of journalism, effected by the newspaper publicity law, was sustained by the court upon very narrow grounds. Publications are not compelled to comply with the provisions of the act; their alternative is to give up "the exceptional privileges of second-class rates" and pay larger postage. This case, then, lends no support to the arguments of those who advocate the control of stock exchanges and corporations through a federal regulation of the mails. For, as pointed out in the early part of this paper, the court expressly refused assent "to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition." embodied in the brief filed on behalf of the government.

This brief suggests, but does not press, a distinction which I believe the courts should and will hold to be controlling; there must be no "regulation of the private business of citizens in a manner beyond any express or implied power of Congress" on the ground

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are concerned, by the judgment rendered in 1892, *In re Rapier*." Hannis Taylor, "The Origin and Growth of the American Constitution," 230. This, however, is an extreme statement.

<sup>46</sup> *Hoke v. United States*, *supra*.

that such regulation "imposes as a penalty for disobedience a denial of an important federal privilege which Congress controls." If a law attempts this, it is invalid. Any legislation excluding from the mails should apply directly to the *things* mailed, not to the *persons* using the mails. This is the distinction which, as we have seen, is characteristic of much interstate commerce legislation. It is a distinction which, if valid, and I think the previous discussion has shown that it is, will prevent Congress from doing indirectly with regard to stock exchanges and corporations what it is unable to do directly. A fraudulent concern has the *use* of postal facilities, but when the mails aid in the fraud, it is *abuse*, and the federal government punishes. This practically resolves itself into the test mentioned above is the exclusion in the nature of a police regulation?

No extension of the postal power to subjects otherwise exclusively under the control of the states was ever contemplated by the framers of the Constitution or by its expounders until very recently. Alexander Hamilton arguing a century ago that Congress had the power to charter a bank, stated the precise issue:

"The only question," he said, "must be in this, as in every other case, whether the means to be employed, or in this instance, the corporation to be erected, has a natural relation to any of the *acknowledged* objects or *lawful* ends of the government. Thus, a corporation may not be erected by Congress for superintending the police of the city of Philadelphia, because they are not authorized to regulate the police of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the states, or with the Indian tribes; because it is the province of the federal government to regulate these objects and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage."<sup>47</sup>

This theory has been scrupulously followed by the decisions from *McCulloch v. Maryland* to the present time. Only one case is at variance, that of *McCray v. United States*, where a tax was upheld. The power to tax is *acknowledged*, that over the mails is *implied*. There is thus no inconsistency. But this vital difference in the nature of the power makes it most important that in the

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<sup>47</sup> The Federalist (Ford's edition), 657.



extension of the postal authority the end be clearly legitimate; the means clearly proper and appropriate; the purpose one clearly sanctioned by the Constitution. In the proposed "nullification by indirection" under the post-roads clause the end is not legitimate, the means not appropriate, and the purpose one not warranted by the Constitution.

When this is the case, it is the privilege and duty of the courts to intervene. For, as Marshall asked, "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"<sup>48</sup> Subject the extension of the postal power to the test of reason, and the answer will be that the federal government may not thus do indirectly, what it is not permitted to accomplish directly. Consider the question in the light of the decisions of the Supreme Court, and the answer is the same. The court can take no other position "without abdicating its highest function and permitting the practical nullification of the Constitution itself."<sup>49</sup>

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<sup>48</sup> *Marbury v. Madison*, 1 Cranch 137.

<sup>49</sup> Victor Morawetz, "The Power of Congress to Enact Incorporation Laws and to Regulate Corporations," 26 HARV. L. REV. 667.

## THE FUNDAMENTAL LAW AND THE POWER OF THE COURTS.

PROFESSOR GRAY, in his recent book entitled "The Nature and Sources of the Law," argues at length in support of the view that, in England and the United States at least, the law consists of the rules which the courts enforce, and that the courts are the real makers and creators of the law. He does not directly consider, however, the possible bearing of this view of the meaning of law upon the development of constitutional law in this country. It is the purpose of the writer of the present paper to draw attention to this question, with the object of showing, not only that this view of the meaning of law finds support in the way in which our constitutional law has developed, but that the assumption by the courts in this country of the power to declare void legislative acts which are inconsistent with our written constitutions finds its true explanation in the fact that all of our law is the law of a court. In other words, the development of constitutional law in this country is but another illustration, and a striking one, of the fact that the existence and development of all law, whether fundamental or common, is dependent upon the existence of a court having power to interpret and enforce it. Without the court the law does not exist.

The objection will at once be made that if the explanation of the power of the courts to declare void legislative acts is to be found in the nature and meaning of law, then the fact that a constitution is written can be of no consequence, and the courts of England should therefore claim the same power over legislative acts. But the reason why the regular courts in England do not have this power is, in fact, the very reason why the courts in this country do have, and must exercise, such power. The situation in both countries is explained by the fact that English law is and always has been the law of a court. It is true that this power of the courts in this country does not depend upon the fact that the constitution is written, and the reason why English courts do not have the same power does not depend upon the fact that there is no written con-



stitution in England. The explanation is that in England Parliament itself is and always has been a court, and the highest court in the realm; it was a court before it was a legislature in the modern sense, and its present legislative supremacy is due, historically, to the very fact that it was already the highest court. The lower English courts, which could not at any time question Parliament's judicial declarations of the law, were in no better position to question, on the ground of law, the legislative enactments of Parliament. Assume that there was a fundamental law in England (and such a law was much talked of in the seventeenth century, at the very time when the full extent of the legislative power of Parliament was first becoming recognized), nevertheless, when the two houses of Parliament passed an act, their judgment as to the validity of that act under the law of England was not the judgment of a legislative body merely, but was the judgment of the highest court in the land. No lower court could question the act for the reason that, in its opinion, it was inconsistent with the fundamental law.

The position of Congress in this country is entirely different. It is recognized that it is the duty of Congress, when it passes an act, not only to consider whether the act is consistent with the Constitution, but perhaps even to form the definite opinion that it is constitutional. But such judgment is never more than a legislative judgment; it is not the judgment of a court, and if the Constitution is law in the sense in which law is understood in England and the United States, then some *court* must interpret it and give it effect. Otherwise it ceases to be law at all, just as in England to-day the existence of a fundamental law is not considered, because the two houses of Parliament exercise no regular powers as a court. Their possession of such powers, however, still prevents the other courts from questioning legislative enactments of Parliament as inconsistent with law. It is the purpose of the present paper to develop the contentions here stated more at length.

## I.

Professor McLaughlin of Chicago University, in a recent essay on the power of the courts to hold legislative acts void, after quoting from Marshall's opinion in *Marbury v. Madison*,<sup>1</sup> goes on to say:

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<sup>1</sup> 1 Cranch (U. S.) 137 (1803).

"Marshall's argument on this phase of the case was brief and direct. To him the Constitution was law, and law meant that the courts were under obligation to accept it and apply it. But of course the mere fact that there was a written constitution in America did not necessarily imply as a logical fact the right of the court to apply that Constitution and *ignore the interpretation of the Constitution by the legislative authority*; that the Constitution was *a law in the sense that it could be and must be maintained by the courts*, even when Congress in exercising its *legislative* power had itself interpreted the Constitution *was the very point at issue*. The thing then to be explained is why Marshall assumed that if the Constitution was law, the courts must place their interpretation on it and not recognize the right of the legislative body to determine its own rights under it."<sup>1</sup>

The explanation of Marshall's assumption in regard to "the very point at issue," as Professor McLaughlin calls it, is to be found, as the present writer contends, in the fact that the Constitution could be law in the English sense only if some court had power to interpret and enforce it; and, while the courts might not "ignore," still they must, if in their judgment erroneous, disregard a merely legislative interpretation of the Constitution. The meaning of the Constitution *as law* could be determined only by the judgment of some court, and Congress, under the Constitution, was not a court.

Professor McLaughlin does not refer to this aspect of the situation, but is content to base Marshall's position upon an "historical background." He says:

"The explanation of Marshall's position must be sought in the historical background, not in mere logical disquisition on the Constitution alone; certainly we cannot rest the judicial authority simply on the supposition that a written constitution can and must be interpreted in courts."

He then traces the idea of a fundamental law back through earlier opinions of courts in this country, and in expressions of various writers in this country and in England. No doubt such expressions are very suggestive as evidence of a general state of mind on the subject, but they do not, after all, explain why lawyers like Marshall accepted so readily, as a necessary logical conclusion,

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<sup>1</sup> The Courts, the Constitution and Parties, pp. 9-10.



the view that if the Constitution did create a fundamental law, then the courts must interpret that law and hold void legislative acts inconsistent with it. The explanation cannot be found, as Professor McLaughlin says, "in mere logical disquisition on the Constitution alone," nor in the fact alone that the Constitution was written; but the reason for Marshall's assumption is not any more satisfactorily explained by showing that other judges and writers had already assumed the same thing, or by showing that a fundamental law which was superior to legislative acts had already been much talked about both in this country and in England. The question still remains, Why had other courts already made this same assumption? Why was it that, if a fundamental law did exist, and if our written constitutions gave definite expression to such a law, it was assumed that the courts must not only enforce that law, but, in the enforcement of it, hold void acts of the legislature inconsistent with such law? The fact that such a fundamental law was talked of in England as well as in this country requires some explanation of the reason why the regular courts there have never assumed the same control over the interpretation of such a fundamental law that our courts have assumed. It is agreed that the fact that our constitutions are written is not a sufficient explanation. Professor Thayer's view, also, that during colonial times lawyers were familiar with the review of colonial enactments to determine their consistency with written charters, serves again only to illustrate a state of mind and familiarity with such questions. Such explanations do not give the ground and reason upon which the power of the courts is to be justified, and do not show why, under the same system of law, the results in England and the United States are apparently so different.

It is precisely the assumption which it is claimed was made by Marshall and other judges in this country in regard to the duty and power of the courts that has recently been made the subject of vigorous attack. It is pointed out that there has always been some opposition in this country to the idea that the courts had power to declare legislative acts unconstitutional, and the fact that such power was never established in England is much emphasized to show that the conclusion is not a necessary one. It is now asserted that this assumption of power by the courts in this country was in fact an act of usurpation. As already stated, how-

ever, the really striking fact about the matter is that almost all lawyers and judges at the time and since have accepted this exercise of power by the courts as a logical necessity, and as the only result consistent with the existence of a fundamental law such as was admittedly created by our written constitutions. The logic of the situation must have compelled strongly to this conclusion or more opposition to this result than in fact appeared would certainly have developed. The interesting inquiry therefore is to discover what there is in our institutions, and in our system of law, that makes such a result seem such a necessary and logical conclusion.

If the Constitution of the United States did establish a fundamental law, then that law was binding upon the courts as well as upon the legislative and executive departments of the government. Article VI of the Constitution expressly provides that the Constitution and the laws and treaties of the United States "shall be the supreme Law of the Land; and *the judges in every state shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." What does it mean to say that a court is bound by the Constitution and laws of the United States?

In most of our states it is also provided by the state constitutions or statutes that the courts shall be bound or governed by the common law. But being bound by the common law does not mean that our state courts do not have power to determine the meaning of the common law. That is exactly what the courts of each state do in fact; they determine conclusively, in cases brought before them, the meaning of the common law in the states in which they exercise jurisdiction. The common law is and always has been the law of courts. The existence of any law apart from a court having power to interpret and declare it is wholly foreign to the English and American conception of the meaning of law. A court is bound by law, not when it has no power to determine what the law means, but only when it is its duty to interpret and apply the particular law. Courts are bound by statutes, but that means that the courts must take such statutes into consideration in deciding cases and determine the meaning and effect of the statutes as law. As the statutes are interpreted and declared by the courts, so are they enforced as law.



A fundamental law, whether created by a written or unwritten constitution, is as much dependent for its existence as law upon the power of courts to interpret and declare its meaning as is the common law or the statutory law. A court which is bound by a fundamental law must enforce that law as such; it must treat the constitution as superior to every other source of law. To regard a legislative enactment as superior to its own interpretation of the fundamental law would be to disregard that law and be no longer bound by it. Only the judgment of a superior court could relieve it of its duty to apply the fundamental law according to its own interpretation of it. In England, Parliament being supreme as a court as well as a legislative body, there could be no fundamental law superior to the declarations of Parliament. Whatever fundamental law there is must be found in the acts and judgments of Parliament itself.

Marshall, therefore, in his opinion in *Marbury v. Madison*, attacked the problem from the right point of view when he considered the essential question to be whether the courts were bound by the Constitution. His conclusion was that the courts were bound by the Constitution, and, for him, that meant, as a matter of course, the assumption by the courts of the power to interpret the Constitution and enforce it as thus interpreted. If the courts were not thus bound to interpret and enforce the Constitution, it must follow, either that the Constitution was not the expression of a fundamental law, or that the acts of Congress should be treated as the judgments of a superior court authorized to determine conclusively the meaning and effect of that law. That the Constitution did establish a fundamental law was Marshall's first proposition; that the courts were bound by it was his second proposition, and his conclusion, or assumption, was that this required the courts to hold void legislative acts which the courts found to be inconsistent with such law. He did not consider the possibility that the acts of Congress might be regarded as the judgments of a court superior to the Supreme Court itself. Such a proposition must necessarily mean, not only that the courts provided for by the Constitution did not constitute an independent and coördinate branch of the government, but that the courts were not in fact vested with all of the judicial power. It involved not only a denial of the independence of the judiciary, but a denial of the separa-

tion of the legislative and judicial powers. It is not strange that Marshall did not stop to consider such a possibility. What neither Marshall nor any other lawyer at that time fully realized was the effect which such a separation of the legislative and judicial powers must have, when, at the same time, a fundamental law was established which must be interpreted and enforced by such a separate and independent judiciary. Not only a fundamental law, but a separate and independent judiciary was required to create the constitutional law of the United States.

It was admitted, of course, that Congress, in acting, ought to consider and decide whether its acts were consistent with the Constitution. But it could not decide such questions as a court for the simple reason that, under the Constitution, it had no power to exercise judicial functions. That is the true significance of the separation of powers under the Constitution. The legislative and executive powers must of necessity interpret the Constitution, and, in the absence of a judicial decision, act upon their interpretation of it, but such interpretation did not and could not declare the Constitution as law. The courts also must interpret the Constitution, and they too must act on their interpretation of it, but such action by the courts meant the declaration and enforcement of their interpretation as law. That is what courts are for; their judgment is conclusive upon the parties before them, and upon other parties in like cases who come after them. The conclusive judicial determination of the fundamental law, as of all law, is vested in the highest court, and as the court decides so is the law enforced. There is no difference between English and American practice in this respect. In both countries all law is determined by, and enforced in accordance with, the judgment of a court. In England the judgment of the highest court in the land upon the fundamental law is conclusive, and it is here. In England that highest court is also the supreme legislative power, and its judgment as to its own legislation is also of necessity the judgment of the highest court. In this country, where the legislative body is a legislature merely, and not a court, the legislature may have an opinion about the fundamental law, and may express it, but the law is not necessarily enforced according to such declaration of it. Our highest court, which is independent of the legislative power, has also the right and duty, in a proper case, to express an opinion



upon the fundamental law, and as the law is expressed by the court so is it enforced. That is what makes it law indeed. The expression of the legislature remains an opinion; the expression of the court becomes the law.

Take, by way of illustration, the very question of the separation by the Constitution of the legislative, executive, and judicial powers. One department of the government must not exercise powers which belong to another department, but who decides whether a particular power is legislative, executive, or judicial? The legislative determination of such a question is not conclusive upon the courts, nor is the decision of the executive power; but the determination of such a question by the Supreme Court, in a case properly before it, is conclusive upon the parties to that litigation, and that is the way in which the Constitution is enforced. If we wish to know, therefore, the effect of this constitutional separation of powers, and know the law in regard to it, we examine the decisions of the courts in cases involving that question. Courts, and courts only, can decide what is law, whether that law be called common, statutory, or fundamental. The words which Professor Gray quotes from Bishop Hoadly are just as applicable in the case of constitutional law as of any other law: "Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes, and not the person who first wrote or spoke them."

Probably there has never been any more effective judicial expression in opposition to this established power of the courts to declare legislative acts void than the opinion of Chief Justice Gibson, of Pennsylvania, in the case of *Eakin v. Raub*.<sup>3</sup> His argument is that the courts in this country have no greater powers than "the powers of the judiciary at the common law," and are properly concerned only with "the administration of distributive justice, without extending to anything of a political cast whatever." Therefore, as "the ordinary and essential powers of the judiciary do not extend to the annulling of an act of the legislature," it must be true also "that the power in question does not necessarily arise from the judiciary being established by a written constitution, but that this organ can claim, on account of that circumstance, no

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<sup>3</sup> 12 Sargeant & Rawle (Pa.) 330 (1825).

powers that do not belong to it at the common law; and that, *whatever may have been the cause of the limitation of its jurisdiction originally*, it can exercise no power of supervision over the legislature, without producing a direct authority for it in the constitution, either in terms or by irresistible implication from the nature of the government."

Having thus limited the power and jurisdiction of the courts, he admits that the constitution is a law of superior obligation which binds the legislature as well as the courts, but he contends that, if, on the one hand, all the organs of government are to be considered equal, then the judgment of the "organ whose business it is *first* to decide on the constitutionality of an act" (the legislature) must be respected by the other organs; or if, on the other hand, the organs of government are not equal in every respect, then at least "each must be supposed to have superior capacity only for those things which peculiarly belong to it; and, as legislation peculiarly involves the consideration of those limitations which are put on the law-making power . . . it follows that the construction of the constitution in this particular belongs to the legislature, which ought therefore to be taken to have superior capacity to judge of the constitutionality of its own acts."

The obvious answer to the first part of this argument, which deals with the limitation of the jurisdiction of the judiciary at common law, is that it gives no consideration whatever to the jurisdiction of Parliament itself as the highest court in the land. The jurisdiction of Parliament as a court was not so limited. The significance of this fact in the development of English law will be referred to more at length subsequently. It is sufficient now to point out that the fact that Parliament was always the highest court, and that its ultimate legislative supremacy was due in large measure to that fact, necessarily destroys the basis of Chief Justice Gibson's argument as to the limited jurisdiction of common-law courts and their power with reference to legislation. The supposed limitation of the jurisdiction of the English courts, other than the High Court of Parliament, was due to their want of power as subordinate courts to question the judgments of the highest court in the land, and not to a want of power in all common-law courts to question acts of legislation as such. As to the power of the highest court in the land to consider the validity of the acts of the supreme



legislative power, that, obviously, was a question which did not arise, because the highest court and the supreme legislature were one and the same body.

In the second part of his argument, while admitting that the Constitution establishes a fundamental law binding upon the legislature as well as the courts, Chief Justice Gibson contends that the legislature has superior power to determine the validity of its own acts, and that the courts are bound by such judgment. This, of course, means, as Chief Justice Gibson says, "that *the construction of the Constitution in this particular* belongs to the legislature," and its judgment, therefore, must be respected as the judgment of a court, and the highest court in such particulars. The judgment of the legislature, in other words, must be treated, not merely as validating certain acts in spite of, or without regard to the Constitution, but as placing a judicial interpretation upon the Constitution which no other court can question.<sup>4</sup>

But this view of the matter necessarily creates difficulties. For instance, when Chief Justice Gibson comes to consider Article VI of the Constitution, which provides that the Constitution and all laws of the United States made in pursuance thereof shall be the supreme law of the land, and that "the judges in every state shall be bound thereby," he concedes that the courts must decide as to the validity of acts of state legislatures claimed to be repugnant to the Constitution of the United States. That is what being bound by the Constitution means. He says that this is "an express grant of a political power" to the courts. It is an express grant, however, only to judges of state courts. He concludes, however, that there is a similar grant intended in such cases to the federal judiciary on account of the provision in Article III which gives appellate jurisdiction to the Supreme Court of the United States in all cases arising under the Constitution. But this is a recognition of the fact that in all such cases the Supreme Court, and not Congress, would have the final word in determining the

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<sup>4</sup> The proposed "recall" of judicial decisions by popular vote, though not yet authoritatively expounded, must mean, either that the people in such cases are to act as a superior court and place a construction on the Constitution which all other courts must respect and adopt in the future, or else that particular legislative acts voted on are to be treated as valid in spite of, or regardless of the meaning of, the Constitution. The difficulties and embarrassments which would result, whichever view was adopted in practice, have not yet received careful consideration.

meaning of the Constitution of the United States. The result would be that both Congress and the Supreme Court would be courts of final jurisdiction in matters involving the interpretation of the Constitution; there would be no final court of review, and there could be, under such a practice, no final determination of the meaning of the Constitution. A consistent body of fundamental law would be impossible of attainment if the validity of acts of Congress and the validity of acts of state legislatures, under the Constitution of the United States, were to be decided by independent courts having no control over one another.

It is clear, therefore, that if the Constitution of the United States did establish a fundamental law which was to be interpreted and enforced as all law is interpreted and enforced, and if the separation of powers under the Constitution was a reality, then the Supreme Court of the United States was the only court having final jurisdiction to interpret the fundamental law, and acts of Congress, as well as acts of state legislatures repugnant to that law, must be held invalid by that court. This result follows, and the assumption of power by our courts is justified, not by reason of any "mere logical disquisition on the Constitution alone," nor by virtue of an "historical background" full of expressions about a fundamental law, but by reason of the nature and meaning of English law as developed and applied in connection with the particular institutions and separate departments of government created by the Constitution. English theories and practice are not only not inconsistent with this result, but, properly understood, support and justify the constitutional powers assumed by our courts.

## II.

The law of England goes back to a time when one body exercised, without distinction, legislative, judicial, and administrative functions. As Professor Adams has said,<sup>5</sup> it is essential to bear in mind in beginning to study the constitutional history of England "that all the functions of the state were exercised by a single institution" — the *curia regis*. "All those functions which we are accustomed to assign in the modern state to different institutions, or sets of officials, were exercised in the feudal state by the *curia*

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<sup>5</sup> The Origin of the English Constitution, p. 345.



without consciousness of difference or an attempt at distinction." <sup>6</sup> Parliament itself was originally more a court than a legislature, according to our modern distinctions. It is perhaps not inaccurate to say that its power to make law in a legislative sense grew out of a better recognized and more customary power to declare existing law in a judicial sense, and the ultimate supremacy of Parliament as a legislative body, with apparently unlimited powers, was due in a large measure at least, to the fact that Parliament continued to be a court, and the highest court in the land, even after it had ceased to exercise what are now considered strictly judicial functions, and had become almost exclusively a legislative body.

The significance of this fact as an explanation of the disappearance in England after the seventeenth century of practically all reference to a fundamental law, and, at the same time, as an explanation of the totally different result in this country — the development by the courts of a complete body of constitutional or fundamental law — has not been fully realized by writers on constitutional law. There are two recent books, however, which emphasize and develop certain ideas in connection with the constitutional history of England which are of the greatest importance in the consideration of this subject, though neither writer points to the significant conclusion which the ideas so developed seem to justify. One of these is the book already referred to, "The Origin of the English Constitution" by Professor G. B. Adams; the other is "The High Court of Parliament and its Supremacy" by Professor McIlwain. The fact which Professor Adams particularly emphasizes is the development in England of an essentially feudal idea of an existing "body of understood, more or less definitely formulated rights which the king was bound to observe and which those who at any time formed the operative force of the nation had the right to force him to observe." <sup>7</sup> Professor McIlwain shows how this feudal fundamental law was, from the beginning, the law of a court; how the king's own courts maintained and exercised the power to interpret and declare this law to which the king was himself subject, and how the king's highest court, Parliament, grew in time from the greatest "law-declaring machine" in the land into the supreme legislative power. And the most extraordinary thing about this development of Parliament from

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<sup>6</sup> The Origin of the English Constitution, p. 344.

<sup>7</sup> Id., p. 157.

a court to the supreme legislative body lies in the fact that it is the House of Commons, which originally had "no part in the judgment making function of the upper house,"<sup>8</sup> which becomes, first, an essential part of this highest court, and finally, in effect, not only the highest court but the supreme legislative power.<sup>9</sup>

Professor Adams points out that *Magna Carta* was not only the declaration of a fundamental law, but that its main object and purpose was the assertion of a principle derived from feudalism, "that there is a body of law above the king which he may be compelled to obey if he is unwilling to do so."<sup>10</sup> Of equal importance, however, was the fact that the body which declared *Magna Carta*, and Parliament itself in the subsequent conflicts with the king, asserted, and asserted successfully, the right to declare and define what this body of law was to which the king was subject. This claim was usually made in the form of an assertion of the supremacy and sovereignty of the law, but this method of asserting the sovereignty of the law meant ultimately the supremacy of the highest court — Parliament; and the supremacy of Parliament as a court meant also, finally, its legislative sovereignty. The subsequent declaration of Coke, in opposition to the claimed sovereign power of the king, "*Magna Charta* is such a Fellow that he will have no Sovereign," and another expression, heard afterwards on both sides of the Atlantic, to the effect that the government is "one of laws and not of men," necessarily involve the claim that some body other than the king has power to declare and interpret the sovereign law. If the king had been willing to act upon the principle stated by Bishop Hoadly, previously quoted, he might readily have recognized the sovereignty of the law, provided only that he maintained the right to interpret it, or to appoint or control the body which did interpret it. To assert merely that the king was above the law was to lose sight of this essential power; better be bound by the law, if being bound by the law means the power to declare what the law is. The final success of Parliament was due, not only to the working out of the principle asserted in *Magna Carta* — that the king is subject to law — but of the establishment at the same time of the principle that all law is declared and interpreted by courts, and that Parliament is the highest court in the land.

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<sup>8</sup> *The Origin of the English Constitution*, p. 315.

<sup>9</sup> *Id.*, pp. 161-163.

<sup>10</sup> *Id.*, p. 167.



From the earliest times in England the law was conceived as a body of principles already existing which could be studied and learned or discovered. Courts existed for the purpose of discovering, applying, and enforcing this law. The power of holding a court was a much valued privilege of the feudal lords, and "feudal law is essentially a law of courts"<sup>11</sup> in the same sense that the common law later is the law of the king's courts. As Parliament is the highest of these courts, there is a tendency for the fundamental law to become more or less identified with the common law; but Parliament as a court develops a law of its own, based upon its own practice and customs, and this gives to its judicial powers a certain indefiniteness which greatly increases the possibilities of development. It enjoys a greater range and freedom in declaring existing law than is enjoyed by the regular common-law courts, and is accurately described as "the most effective law-declaring machine in the Teutonic world."<sup>12</sup>

Professor McIlwain has traced the activities of Parliament as a court, and, while emphasizing the fact that it is the "fusion of indefinite powers,"<sup>13</sup> without any recognized distinction of judicial, legislative, and administrative functions, which is characteristic of the Parliament of the Middle Ages, he shows also that "the great phases of the English Parliament have been its history as a court, then as a legislature, and finally as a government-making organ," and that it "definitely passed out of the first of these stages at the first session of the Long Parliament."<sup>14</sup> Until that time its judgments or acts were, for the most part, more in the nature of declarations of an existing law, or declarations intended to supply rules and remedies in connection with the enforcement of such a law, than acts of legislation in the modern sense. Not only Parliament, but, as Professor McIlwain points out,<sup>15</sup> other courts, prior to the middle of the seventeenth century, exercised the power of declaring law apart from the decision of litigated cases. This power has survived with the regular courts only in respect to the making of rules relating to the government of their own practice and procedure, and, in this country, the line between the power of the legis-

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<sup>11</sup> Jenks, *Law and Politics in the Middle Ages*, p. 24.

<sup>12</sup> *Id.*, p. 44.

<sup>13</sup> *The High Court of Parliament*, p. 119.

<sup>14</sup> *Id.*, pp. 93, 352.

<sup>15</sup> *Id.*, pp. 135-137.

lature and the power of the courts in such matters has never been clearly drawn. But in the case of Parliament, which was the *highest* court, this power to declare an existing law had a reach which the lower courts could not attain. It is precisely this acknowledged position of Parliament as the highest "law-declaring machine" that made possible and comparatively easy its assumption of legislative supremacy. This is the fact which is of special significance in connection with our constitutional problem, and this point Professor McIlwain does not bring out clearly, if, in fact, he fully recognizes its significance.

The supremacy of Parliament is not explained by saying that after 1640 it became the legislative sovereign. The reason why it became the recognized legislative sovereign was because it previously was, and still continued to be, the highest court. Its acts were supreme and their validity unquestionable under the law, not because it was legislatively supreme, but because it was supreme judicially. There was no lower court which could question any act of both houses of Parliament as inconsistent with the fundamental law or the *lex et consuetudo parliamenti*. It could not question its declaration of the *validity* of *new* law any more than it could question its declaration of the *meaning* of *existing* law. Parliament was not at some times a court and at other times a legislature; it was always both.<sup>16</sup> Any act of Parliament, whether a positive enactment of new law or not, carried with it the declaration of the highest court in the land that it was in accordance with the fundamental law. There was no other court with power to interpret the fundamental law differently from the interpretation thus placed upon it by the High Court of Parliament.

As for the king, he was beaten in the contest for legislative sovereignty by the same fact that Parliament was his highest court,

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<sup>16</sup> See the reference by Professor McIlwain, *The High Court of Parliament*, p. 243, to the argument of Atkyns in the case of Sir William Williams. Professor McIlwain says that Atkyns "cannot be rid of the old idea that *in all its actions* Parliament is bound by some law; . . . he has made the transition to the idea of legislative sovereignty, but he has done it under the old forms and with the old terms. Parliament is still a court and its functions are in the main judicial, but under its *lex parliamenti* it may do any act it pleases and shall never be questioned for it beyond its walls." But the way in which the transition to the idea of legislative sovereignty was made is the significant fact about the whole matter, and Atkyns's attitude explains excellently the theory on which the idea of legislative sovereignty was based.



and as such had power to declare an existing fundamental law to which the king was subject. The making of new law consistent with the fundamental law was already a recognized power of Parliament. Although not as frequent in the past as they were to be in the future, many acts of that description had been already passed, and were, like the power to declare old law, justified by the "Lawes and Customs of the Realm," which "as well enable the exercise of this (the making of new law) as of the ordinary and judicial power."<sup>17</sup> What was new was the more frequent exercise of this power, and in some cases the exercise of it in such a way that the old fundamental law as previously understood was changed or modified. Parliament, being a court as well as a legislature, could do this without claiming to be above the law, while the king could not. Parliament could recognize the sovereignty of the fundamental law without weakening its own sovereignty; but the sovereignty of the fundamental law was fatal to the king's contention. Professor McIlwain, quoting Pym, brings this out clearly:

"The struggle over the Petition of Right and the question of Tonnage and Poundage did much to familiarize men still further with the idea of fundamental law. For example, when the Lords would have added to the Petition of Right the clause saving the 'Sovereign Power' of the King, a storm of protest arose in the Commons. To acquiesce in this addition would be to 'acknowledge a Regal as well as a Legal Power.' Pym recognizes clearly the sovereignty of the fundamental law, not only over the King, but over Parliament as well. 'All our Petition is for the Laws of England, and this Power seems to be another distinct Power from the Power of the Law: I know how to add Sovereign to his Person, but not to his Power: And we cannot leave to him a Sovereign Power: *Also we never were possessed of it.*'"

Professor McIlwain quotes Coke and Wentworth to the same effect. If the fundamental law was sovereign, then of course neither Parliament nor the king was possessed of such power; but to be the highest court as well as legislature was to be the maker and interpreter of sovereignty, and nothing more was needed but the continued exercise of such power to make the supremacy of Parliament a recognized fact. The continued exercise of legislative power by Parliament, with the absence of all power in any other person or

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<sup>17</sup> The High Court of Parliament, p. 151, quoting St. John.

body as a court to question the consistency of its acts with the fundamental law, meant in time the disappearance of all discussion of the fundamental law, and the recognition of Parliament as legislative sovereign. But it remains true, nevertheless, that this legislative sovereignty of Parliament depends upon the fact that Parliament continues to be the highest court in the land, and that when it acts at all it acts as a single body having both legislative and judicial power. ✓

We can now understand the true aspect and significance of the controversy between king and Parliament after 1640, when Parliament had fully realized its power and had begun, with definite purpose, to make new law and legislate continuously in the modern sense. Assuming that the king was bound by the old established fundamental law, even as declared by Parliament, was he also bound by this new law of Parliament which was admittedly often different from the fundamental law as previously recognized and apparently established by precedent? The question is no longer, Is the king bound by the established law? but, Who has power and authority to enact and create as law that which was not known as law before? The question, therefore, which is argued back and forth by the political writers of this period is this question of legislative sovereignty. To quote Professor McIlwain again:

"The royalist writers are as much affected by the change as their opponents. For the future, there is little difference whether the writers be royalist or parliamentary, — they both accept the new idea of *legislative sovereignty*. For the royalists this sovereignty lies in the King alone, for their opponents in the Parliament; but both reject the idea of a supremacy of law. To say with Hobbes and Filmer that the King is above the law, or with Milton that Parliament can make or unmake any law whatsoever, is to deny the traditional doctrine. The functions of King and Parliament are not *jus dicere*, as Coke thought but *jus dare*. Judicial supremacy has given place to legislative sovereignty, whether the sovereign be the King or the Parliament. Speculators on both sides would have agreed with the admirable summary of Hobbes: 'It is not wisdom, but authority that makes a law.'"<sup>18</sup> ✓

And so law comes to be defined as the command of the sovereign.

But it is not accurate to say that "judicial supremacy has given

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<sup>18</sup> The High Court of Parliament, p. 94.



place to legislative sovereignty," or that "the traditional doctrine" is denied by both parties. The truth of the matter is better expressed by saying that it was by virtue of its judicial supremacy that Parliament exercised the power to determine this new question according to law, and that only so could the "traditional doctrine" be maintained. This question of legislative sovereignty, or rather, the question of the validity under the fundamental law of these new acts of Parliament, if it was to be settled according to law, must be determined by the highest judicial authority. Hobbes and Filmer and Milton might write countless books about the question, but the question could be settled according to the established practice of English law only by the highest court in the land. If the controversy was to be determined in that way, the outcome could not be in doubt, since Parliament was already admittedly the highest court in the land. And it is precisely upon this power to declare the fundamental law to which the king was subject that Parliament based its contention. The king was still the "fountain of justice," but Parliament was his highest court. This position was definitely stated in 1642 when Parliament made the declaration in answer to the king's proclamation forbidding his subjects to obey the order of Parliament for mustering the militia. This is quoted by Professor McIlwain, and the significant portion is as follows:

"It is acknowledged that the King is the Fountain of Justice and Protection, but the acts of Justice and Protection are not exercised in his own Person, nor depend upon his pleasure but by his Courts, and by his Ministers who must do their duty therein, though the King in his own Person should forbid them: and therefore if Judgments should be given by them against the King's Will and Personal command, yet are they the King's Judgments. The High Court of Parliament is not only a Court of Judicature, enabled by the Laws to adjudge and determine the Rights and Liberties of the Kingdom, against such Patents and Grants of His Majesty as are prejudicial thereunto, although strengthened by his Personal Commands, and by his Proclamation under the Great Seal, but it is likewise a Council to provide for the necessity, to prevent the imminent Dangers, and preserve the publick Peace and Safety of the Kingdom, and to declare the King's pleasure in those things that are requisite thereunto, and what they do herein hath the stamp of Royal Authority, although his Majesty seduced by evil Council, do in his own Person oppose or interrupt the same, for the King's Supream and Royal pleasure is exercised and declared in this High Court of Law

and Council after a more eminent and obligatory manner, then it can be by any personal Act or Resolution of his own." <sup>19</sup>

In this declaration we have the idea clearly expressed, not only that the High Court of Parliament is a court of judicature whose judgments are the judgments of the king, but that it has power also, as "High Court of Law and Council," to pass enactments necessary to the public peace and welfare and declare the validity and binding effect of such enactments. It is not by virtue of its legislative supremacy alone, but by virtue of its judicial supremacy that such enactments of Parliament are validated and become the judgments of the king himself. The king is subject to the law, and to the law as declared by his own highest court.

Even after Parliament's legislative sovereignty is fully accepted, and the two houses together act only as a legislature acts, and not as a court, the fact that Parliament is a court is still recognized. The statement of Coke, "that the lords in their house have power of judicature, and the commons in their house have power of judicature, and both houses together have power of judicature," <sup>20</sup> continues to be the accepted legal theory. The great cases on parliamentary privilege serve excellently to illustrate this. The theory of the seventeenth century seems to have been that the legislative power and the privileges of Parliament were determined, not by the common law or the law of the land, but by the law and customs of Parliament, which Parliament alone could authoritatively determine and declare. Professor McIlwain quotes the statement of the Attorney General in *Fitzharris's Case* to this effect,<sup>21</sup> and Coke emphatically expressed himself of the same opinion. The question which arose in subsequent cases was, whether the House of Commons alone could conclusively decide the scope of its own privileges, so that its determination could not be questioned in other courts. Coke considered the determination of the House of Commons conclusive upon the common-law courts, because a matter in Parliament "is not to be decided by the common laws, but *secundum legem et consuetudinem parliamenti*," <sup>22</sup> and the courts of Parliament, and not the common-law courts, were the only courts having jurisdiction to determine conclusively

<sup>19</sup> The High Court of Parliament, pp. 389-390.

<sup>21</sup> The High Court of Parliament, p. 238.

<sup>20</sup> Institutes, Fourth Part, p. 23.

<sup>22</sup> Institutes, Fourth Part, p. 14.



the meaning of that law. This view, however, did not prevail in the later cases, and the *lex et consuetudo parliamenti* was held to be a part of the same law of the land which it was the duty of all judges to know or ascertain. A judgment or enactment of both houses of Parliament was conclusive in other courts, because the judgment of the highest court in the land, but there was no law with reference to which either house by itself was supreme. Lord Denman in the great case of *Stockdale v. Hansard* <sup>23</sup> says: ✓

"Parliament is said to be supreme: I must acknowledge its supremacy. It follows, then, as before observed, that neither branch of it is supreme when acting by itself. It is also said that the privilege of each house is the privilege of the whole parliament. . . . But it by no means follows that the opinion that either house may entertain of the extent of its own privileges is correct, or its declaration of them binding."

Pike, in his *Constitutional History of the House of Lords*, p. 248, refers to a case in the reign of Henry VI of a petition of the House of Commons to the House of Lords on behalf of Thorpe, Speaker of the House of Commons, who had been tried in the Exchequer on a certain charge, and the Lords summoned the judges on the question of privilege, and Chief Justice Fortescue replied that they

"ought not to make answer, for it hath not been used aforetime that the Justices should in any wise determine the privileges of this High Court of Parliament. For it is so high and mighty in its nature that it may make law, and that that is law it may make no law, and the determination and knowledge of that privilege belongs to the Lords of the Parliament and not to the Justices."

Patterson, J., in the same case says:

"With respect to the interpretation and declaration of what is the existing law, the House of Lords is doubtless a superior court to the courts of law. And those courts are bound by a decision of the House of Lords expressed judicially upon a writ of error or appeal, in a regular action at law or suit in equity, but I deny that a mere resolution of the House of Lords, or even a decision of that house in a suit originally brought there . . . would be binding upon the courts of law."

Holroyd's argument in the previous case of *Burdett v. Abbot* <sup>24</sup> develops this view at length, and meets the objection that the privileges of the House of Commons would, in that event, be de-

<sup>23</sup> 9 Adolph. & Ellis 1 (1839).

<sup>24</sup> 14 East 1 (1811).

terminated by its rival, the House of Lords, on appeal from the lower courts, by saying that any privilege "is the joint privilege of the whole parliament," and the Lords "cannot negative the claim of the commons without deciding at the same time against their own privilege." Needless to say this does not permit the House of Commons to decide its privileges for itself. The objection which the judges made to that claim was that the House of Commons might not confine itself to the privileges already established by the law of the land, but might enlarge its privileges, without regard to precedent. The determination of the law by resolution or declaration merely, when made by either house alone, the judges would no longer assent to, even though admitting that each house separately was a court. "No resolution of either house of parliament, *taking it to have decided judicially upon the matter before it*, can make that a legal privilege of parliament which was not so before by law. . . . A new privilege can only be enacted by act of parliament."

This claim of either house in the matter of privilege was, however, precisely the same claim that had been made by the whole Parliament, and sustained, in the matter of legislation or the right to make new law. That claim too had been based upon Parliament's supremacy as a court. And even in this matter of privilege, the supremacy of both houses acting together as a court is still recognized. After pointing out that the House of Lords could decide the question of privilege in a regular cases coming to it on appeal from the lower courts, Holroyd goes on to say, citing Lord Hale, that the judgments of the House of Lords are not "irremediable, though no person can appeal as a matter of right; for there are many instances in which the whole parliament have interfered by passing an act to correct or *reverse* a judgment of the house of lords, and in that way the commons themselves might, by the weight and influence of the means they possess, ultimately assert their own right, if upon a full investigation of the matter by the whole parliament, it should be found that *any error* had crept into such a judgment, or that the privilege claimed was such as ought in future to exist." This shows a recognition of the fact that both houses of Parliament might still act as a court as well as a legislature, though not strictly a court of appeal.<sup>25</sup>

<sup>25</sup> There are other powers which are still recognized as belonging to the Houses of Parliament because they are courts. In the case of *Kielly v. Carson* (4 Moore's P. C.



The judges in the later English cases do not fairly meet the contention of Coke on the question of privilege and the *lex et consuetudo parliamenti*. They argue as if Coke's whole contention was that the judgment of the House of Commons on the question of its privileges must be conclusive because the books and records on which its judgment was based were accessible only to that house, and could not be known or examined by the judges of other courts. But that is not the real ground of Coke's contention. With Coke all law was not only a matter for experts, something which only the judges could define, but all law was the law of some particular court. The common law was the law of the common-law courts; canon law was the law of the ecclesiastical courts; and the *lex et consuetudo parliamenti* was the law of the courts or houses of Parliament. The House of Commons alone would not have jurisdiction to determine the common law to the exclusion of the common-law courts, but its determination of matters based upon the law and customs of the House of Commons was within its peculiar jurisdiction to the exclusion of the common-law courts. This view, although it did not prevail, is not answered by the later English judges. The common-law courts gradually absorb all the different kinds of law, which all become a part of the law of the land. Except for the appellate jurisdiction of the House of Lords, the regular business of Parliament is now legislative, and the *lex et consuetudo parliamenti* disappears as a separate body of law, because there are no separate courts having exclusive jurisdiction to declare it. The common law is no longer the law of the common-law courts; it is the law of the land, or the law of England — a general law — and the decisions of the courts are said to be only evidence of this law.<sup>20</sup> There is no longer a fundamental law which is different

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63) it was held that the legislative assembly of Newfoundland could not claim the power to punish for contempt on the ground that such power was essential to the exercise of its functions as a legislature, and the power of the houses of Parliament in this regard was justified by virtue of the fact that they were courts. And in *Kilbourn v. Thompson* (103 U. S. 168) our Supreme Court denied the power of Congress to punish for contempt, on the ground that Congress was a legislative body merely while Parliament was a court and exercised such powers as a court. It should be noticed, however, that in another case (*Maynard v. Hill*, 125 U. S. 190) the power of legislative bodies in this country to grant divorces is justified on the ground of usage derived from the practice of Parliament, obviously a dangerous ground on which to base the powers of legislative bodies in this country.

<sup>20</sup> See Holroyd's argument in *Burdett v. Abbot*, *supra*.

from this general common law, but the common law is all the law there is, with the exception of the new law created by statute. The common law and the statutes make up the whole law of England, and Parliament as a legislative body is supreme. That is the modern doctrine.

But while it is true to-day to say that Parliament is above the law, if we mean by that that it is not subject to law as declared and enforced by the regular courts, it is more accurate historically to say that Parliament is still subject to law, but that it is not subject to be controlled by other courts.

### III.

The conclusion is that there is no difference in theory between the fundamental law of England and the fundamental law of this country. In both countries the fundamental law may still be called sovereign, and in both countries the fundamental law is subject to the interpretation and declaration of courts. The difference in practical results is not due to the fact that in one country there is a written constitution and in the other there is not. The real difference is due to the fact that in England the body that legislates has also the power to interpret the fundamental law and determine the validity of such legislation, while in this country the body which legislates has no power as a court to interpret the fundamental law, but there are courts which are also bound by the fundamental law, and, being so bound, must as courts interpret the fundamental law and declare the validity or invalidity of legislative acts under that law. Congress, as has been pointed out,<sup>27</sup> must, in the first instance, pass upon the validity of its own enactments, and, while its judgment is entitled to great respect, it is necessarily only a legislative judgment. The courts are still bound, if the Constitution is an expression of fundamental law, to determine judicially the validity of acts of Congress under that law. No other result is logically possible, unless either the Constitution is disregarded as law or Congress is made the highest court for its interpretation. In either case the fundamental law which we now have would disappear.

*Herbert Pope.*



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PROFESSOR JOHN CHIPMAN GRAY for the first time in many years is not present at the opening of the Law School as a member of its teaching force. Professor Gray was first appointed a lecturer on December 24, 1869, before Dean Langdell came from practice to the Law School, and he was reappointed for several years more before he became Story Professor in 1875. From that time he served continuously as Story Professor and later as Royall Professor until last February, when he withdrew from active teaching and became Royall Professor *emeritus*. Every member of the present Faculty has thus sat under his instruction. All who have enjoyed that privilege will remember him as a teacher exempt from the defects which often accompany such qualities as his,—learning boundless in extent, yet at every point exact and serviceable; mind moving swiftly and without friction to meet the questioner's thought, yet reaching a shrewd and ripened judgment; diction of the plainest, yet singularly graceful and pungent. But they will remember him best as the friend whose love for the Law School kept him all these years at work for them, putting aside calls for distinguished service elsewhere, and who dedicated his latest volume "to his old pupils, whose affectionate regard has been to him a life-long blessing, from their grateful master."

It is cause for rejoicing that his work on a new edition of a treatise which has reflected high credit on the Law School and on American scholarship will keep him much among us, even though we lose the benefit of his class-room instruction.

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THE RESIGNATION OF MR. ARNOLD AND THE APPOINTMENT OF MR. ADAMS. — The School has suffered another great loss in the resignation

of Mr. Arnold, after more than forty years' uninterrupted service. He held the office of Librarian during Mr. Ames's whole administration, and almost the whole of Mr. Langdell's, and his single-minded devotion to the interests of the School was not less than theirs. The present library is a monument to him, and its growth under his hands, from about fifteen thousand volumes when he was appointed, on August 7, 1872, to more than one hundred and fifty thousand at the date of his resignation, tells the story of his labors. The acquisition of the Dunn Library last year was a fitting termination to his life's work. At its meeting last June the Harvard Law School Association, to show the appreciation the alumni feel for the services rendered the school by Mr. Arnold, voted that his portrait be painted and presented to the Law School.

The School has been remarkably fortunate in the choice of Mr. Arnold's successor. Mr. Adams graduated from Harvard College in 1892 and from the Law School in 1897. During his course he greatly distinguished himself in scholarship, and was one of the editors of this Review. Afterward he practised in Boston, and in 1902-3 he lectured on Property in the Law School. He was chosen Librarian of the Social Law Library in 1909, and held that position till he accepted the call to succeed Mr. Arnold. He thus comes to his present work unusually equipped with legal and library experience.

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THE LAW SCHOOL. — A number of important changes have been made in the curriculum of the Law School and in the arrangement of courses for this year. In order to qualify for a degree the members of the Third Year Class are required to be prepared for examination in six regular courses, instead of five, as in former years. One fourth-year course may be elected as a regular by third-year men. The course in Massachusetts Practice, given two years ago, will be repeated this year, under Mr. J. G. Palfrey, A.B., LL.B., who conducted it before. A course on Jurisprudence will be given by Professor Pound. This course will combine the half-year courses on Analytical Jurisprudence formerly conducted by Professor Beale, and Professor Pound's own lectures on the Theory of Law.

Owing to the deeply regretted resignation of Professor John Chipman Gray, a new arrangement of lecturers for the second and third year courses in Property was necessary. Mr. Charles F. Dutch, who has formerly been lecturer on Admiralty, and taught Equity III for one year, will give the third-year course on Property, and the division of second-year Property relating to Conveyances *inter vivos*. The position of lecturer on Wills, left vacant by the resignation of Mr. Roland Gray, will be taken by Professor Joseph Warren. Quasi-Contracts will be given by Assistant Professor Scott. Mining Law will be conducted by Mr. E. G. Davis, A.B., LL.B., a member of the Boston Bar, who gave the course in 1909-10. Mr. Lucius Ward Bannister, A.B., LL.B., will teach Water Rights, a half-year extra course in the second term. Mr. Bannister is a member of the Denver Bar and has been lecturer on Water Rights in the Denver Law School.



It is very pleasant to be able to congratulate Professor Joseph Henry Beale, A.M., LL.B., LL.D., who succeeds Professor Gray as Royall Professor of Law; Professor Roscoe Pound, Ph.D., LL.M., who has been appointed to the Carter Professorship of General Jurisprudence left vacant by Professor Beale; Professor Edward Warren, A.M., LL.B., who will now occupy the chair of Story Professor of Law, succeeding Professor Pound; and Professor Joseph Warren, A.B., LL.B., who has been appointed Professor of Law.

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THE AMES COMPETITION. — Twenty-four law clubs have entered the competition this year. The rules governing the elimination tournament are substantially the same as in preceding years. Instead of money prizes, law books will hereafter be given to the successful clubs. An additional prize is offered for the best brief submitted in the competition. First and second prizes were won last year by the Beale and the Wyman Clubs respectively. It has been decided to change the rules of the competition next year, the purpose being to stimulate still more the interest in the work of the second-year clubs. The competition will extend over two years instead of being concluded in one. Each second-year club entering will meet a certain number of other clubs, and a limited number having the best record will argue the final rounds in the third year. The rules for next year will be announced later in more detail. The Board of Student Advisers who have charge of the competition this year is composed of Harvey H. Bundy, Chairman, Albert M. Cristy, Joseph J. Daniels, C. Pascal Franchot, George K. Gardner, Herbert F. Goodrich, John S. Miller, Jr., Herman E. Riddell.

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THE LORD HIGH CHANCELLOR AND THE GREAT SEAL. — In order to attend the meeting of the American Bar Association in Montreal, Lord Haldane, the Lord High Chancellor of England, had to put the Great Seal in commission. This consists in the appointment of three commissioners who are entrusted for the time being with the actual custody of the Seal and some of the important duties of the Chancellor. The placing of the Seal in commission was not a new thing. But the fact that Lord Haldane did this and at the same time retained his position as Lord High Chancellor did constitute an innovation. Never before apparently has the *Clavis Regni* been put in commission by a chancellor who continued in office. Lord Haldane has therefore established a precedent. Unlike his predecessors Wolsey and Brougham, his departure from tradition has been fully approved and commended by the King.

The custody of the Great Seal and of the king's conscience has seemed such an important function in England in times gone by that down to 1830 no chancellor, with the exception of Cardinal Wolsey, ever dared to leave the kingdom during his tenure of office. In fact, as Lord Haldane pointed out in his address at Montreal, Cardinal Wolsey almost lost his head for an unpermitted journey to Calais. In 1830 Lord Brougham took his place on the woolsack, and a year or two later aroused much

excitement and indignation by his unauthorized visit to Scotland, where he is said to have lost the Great Seal while playing games and antics in a Scottish country house. A lady of the party found the Seal, and made the Lord Chancellor redeem it by playing a game of blindman's-buff. While the game proceeded he was guided by music to a tea-chest where the Seal had been carefully hidden. That the keeper of the royal conscience should thus make a plaything of the Great Seal of England annoyed the King to such an extent that it is said he referred to Brougham's journey as "high treason."

Important as the functions of the Lord High Chancellor were, and in spite of the fact that he had the king's ear, he seems in the early days to have received a salary about as commensurate with the dignity of his position as the salary of many American judges to-day is with their positions. "From one of the records," says Lord Haldane, "it appears that his wages were five shillings, a simnel cake, two seasoned simnels, one sextary of clear wine, one sextary of household wine, one large wax candle, and forty small pieces of candle."

The meeting of the American Bar Association at Montreal, which was the occasion of the Lord Chancellor's visit to this country, was the first to be held outside of the United States. Its international aspect was further emphasized by the presence of the distinguished Maître L. Labori, the foremost lawyer of France. Particularly in keeping, therefore, with the spirit of the gathering was Lord Haldane's address, in which he presented an eloquent plea for a full international "sittlichkeit." Lord Haldane explained that "sittlichkeit" is the German for that "system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations of the citizen which it is 'bad form' or 'not the thing' to disregard." "Sittlichkeit" thus occupies a field midway between the dictates of conscience and the commands of the law. Upon the lawyers of the three great nations represented in the assemblage to which he spoke he urged the nourishing of a "sittlichkeit" of international scope, because he said to him the conception seemed more hopeful of realization between nations bound together by a "common inheritance in traditions, in surroundings, and in ideals."

It is interesting to note that in the course of an interview published in the New York Sun for August thirtieth Lord Haldane said, "I am convinced that the Harvard Law School is a model for the world." On another occasion the newspapers quoted him as saying that he considered the school second to none. It should be gratifying, not alone to graduates and friends of the Harvard Law School, but to Americans generally, that the Lord High Chancellor of England could make these statements of an American school of law.

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**JURISDICTION OF EQUITY TO ENJOIN EXPULSION FROM CLUBS.** — Practically every club<sup>1</sup> has in its constitution or by-laws some provision empowering a named committee to expel a member for cause.<sup>2</sup> Courts

<sup>1</sup> "Club" in this article is used in the sense of an unincorporated club. The rules applying to incorporated clubs are, of course, quite different. See COOK ON CORPORATIONS, 6 ed., §§ 11 and 504.

<sup>2</sup> See WERTHEIMER'S LAW RELATING TO CLUBS, 4 ed., p. 125.



of equity will not review the decisions of these committees except in three classes of cases: where the rules by virtue of which the expulsion is effected are "contrary to natural justice"; where the proceedings held are not in accordance with the rules; where the action of the committee is purely malicious.<sup>3</sup> An unincorporated club is a voluntary association of individuals, all rights in which are derived solely from the association, not from the law.<sup>4</sup> On what right of the expelled member, then, do the courts base their jurisdiction to grant him relief?

Some courts assert that their jurisdiction grows out of their power to enforce contracts specifically.<sup>5</sup> The constitution and by-laws of the club, they argue, form a contract between the member and the association, into which is read a stipulation that the rules will be administered in good faith.<sup>6</sup> Hence expulsion without compliance with the rules is the violation of a contract, and the damages at law being clearly inadequate there may be equitable relief. In two aspects this theory is objectionable. First, a contract does not always exist. Since the association is not a legal entity, and therefore has no capacity to enter into a binding agreement,<sup>7</sup> the contract, if any, must be between the incoming and the already admitted members. Such a contract is perfectly possible, but the relationship can be merely associational,<sup>8</sup> not contractual.<sup>9</sup> Secondly, granting the existence of a contract, the theory disregards the fact that the contract involves so largely the discretion of the club, or its committee, that courts should hesitate to enforce it. Other courts, chiefly English, found their jurisdiction on the protection of property rights, asserting that every member has an interest in the club property, of which unfair expulsion will unjustly deprive him.<sup>10</sup> Protection of property rights is a function of equity courts; and this theory, therefore, is sound, in so far as true property rights are involved.<sup>11</sup> In proprietary

<sup>3</sup> These three classes of cases in which courts will interfere were first laid down in *Dawkins v. Antrobus*, 17 Ch. P. 615, 630. Later cases have laid down the same rule, but no case has been found where jurisdiction has been taken for the first or third reasons. For jurisdiction based on the protection of property. *Labouchere v. Earl of Wharnclyffe*, 13 Ch. D. 346, is an example of Q.

<sup>4</sup> See *White v. Brownell*, 2 Daly (N. Y.) 320, 337. No one has a legal right to membership in such an association. See NIBLACK, *BENEFIT SOCIETIES AND ACCIDENT INSURANCE*, 2 ed., § 30.

<sup>5</sup> See *Krause v. Saunder*, 122 N. Y. Supp. 54, 55.

<sup>6</sup> See *Blisset v. Daniel*, 10 Hare, 493, 522.

<sup>7</sup> See *Steele v. Gourley*, 3 Ti. Rep. 119. Creditors must proceed against the club members who incurred the debts. See *In re London Marine Association*, L. R. 8 Eq. 176, 195.

<sup>8</sup> There would seem to be no reason why this word should not be regarded as a correct legal term. The meaning which it conveys is certainly well recognized.

<sup>9</sup> A good example of an association in which there are no contractual ties between the members is a college alumni association. The incoming graduate certainly has no thought of contracting with the other graduates. He simply enters the organization on the footing of an associate.

<sup>10</sup> For a good statement of the principle, see *Rigby v. Connol*, 14 Ch. D. 482, 487.

<sup>11</sup> Injunctions against the unfair expulsion of members of a stock exchange, on which the seats are very valuable, are therefore properly granted. *Hutchinson v. Lawrence*, 67 How. Prac. (N. Y.) 38. Also there are real property rights in cases of beneficial insurance associations and insurance lodges. And so in disputes between churches, or between a church and one of its members, equity should take jurisdiction if real property rights are involved. *Yanthis v. Kemp*, 43 Ind. App. 203, 85 N. E. 976; *Boyles v. Roberts*, 222 Mo. 613, 121 S. W. 805.

clubs<sup>12</sup> no such rights are found; and the English courts, consistently with their theory, refuse relief in such cases.<sup>13</sup> In members' clubs, however, trustees hold property for the club; therefore there is in every member the equitable property right of a *cestui que trust*.<sup>14</sup> Though this right is not a severable one,<sup>15</sup> and is contingent and defeasible on the member's voluntary or involuntary retirement from the club,<sup>16</sup> it is nevertheless a true property right; and the courts properly relieve against a threatened or consummated expulsion which would illegally deprive the plaintiff of it.<sup>17</sup> Since, however, the association has the power to terminate the right for cause, and is by the articles of association made the judge of cause, the courts, adopting the general attitude toward the decisions of quasi-judicial tribunals,<sup>18</sup> should accept the committee's *bonâ fide* rulings on all questions of construction of the rules or of cause for dismissal. A recent English case, enjoining expulsion because the court thought that the club rules had not been correctly interpreted and applied, therefore seems erroneous. *D'Arcy v. Adamson*, 57 Sol. J. 391. Courts should interfere only where the expelling body is not the properly constituted one, and where the action is palpably contrary to the letter and the spirit of the articles. This, indeed, is substantially the meaning of the three exceptions mentioned in the beginning of this article. They are, however, vague and artificial; and courts would reach better results by dispensing with them and dealing with each case on general principles.

A PATENTEE'S RIGHT TO LIMIT THE RESALE PRICE OF A PATENTED ARTICLE. — One who manufactures and sells articles of commerce cannot, apart from statute, restrict the resale or the use of such articles by mere notice to the purchaser or sub-purchaser. The common law has always been opposed to such restraints on chattels.<sup>1</sup> Furthermore, contracts limiting the use or sale do not run with chattels even though the purchaser has notice thereof.<sup>2</sup> The Copyright Act, which secures to the author, inventor, designer, or proprietor of books, etc., "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same"<sup>3</sup> has been construed to give no additional

<sup>12</sup> Clubs in which one man owns the club house and property, manages the finances, and charges each member regular dues for the use of the premises, see WERTHEIMER'S *LAW RELATING TO CLUBS*, 4 ed., 1.

<sup>13</sup> *Baird v. Wells*, 44 Ch. D. 661; *Lyttleton v. Blackburn*, 45 L. J. Ch. 223.

<sup>14</sup> There is one suggestion that a property right exists even though the club owns no property, the idea being that membership alone is a property right. See STEVICK, *UNINCORPORATED SOCIETIES*, § 42. The theory is ingenious and perhaps sound, but the law has not yet developed this far. See NIBLACK, *BENEFIT SOCIETIES AND ACCIDENT INSURANCE*, § 75.

<sup>15</sup> See *McMahon v. Raubor*, 47 N. Y. 67, 70.

<sup>16</sup> See *Lawson v. Hewel*, 118 Cal. 613, 621, 50 Pac. 763, 765.

<sup>17</sup> *Innes v. Wylie*, 1 C. & K. 257; *Fisher v. Keane*, 11 Ch. D. 353; *Labouchere v. Earl of Wharcliffe*, *supra*.

<sup>18</sup> See POLLOCK, *TORTS*, 9 ed., 124.

<sup>1</sup> COKE, *LITTLETON*, § 360; BENJAMIN, *SALES*, 6 ed., 746.

<sup>2</sup> *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219. See *Park & Sons v. Hartman*, 153 Fed. 24, 39. But see 17 HARV. L. REV. 415.

<sup>3</sup> Revised Statutes, § 4952.



right to limit by notice the price at which the subject of the copyright is resold.<sup>4</sup>

In view of the fact that a patentee is given by statute greater power than the owner of a copyright, it has been the opinion of a majority of the lower courts that disregarding a notice on a patented article limiting the resale price would be an infringement of the patent.<sup>5</sup> By the patent statute every patentee is granted the exclusive right to make, use, and vend the patented article.<sup>6</sup> But a recent decision in the Supreme Court of the United States construes this statute as giving the patentee no right to limit the resale price by notice. *Bauer & Cie v. O'Donnell*, 33 Sup. Ct. Rep. 616. Four justices dissented. The majority argue that "the exclusive right to vend" in the patent statute should be interpreted in the same way as "the sole liberty of vending" in the Copyright Act. Since broader rights are given to the patentee, it is hard to see why the construction of the one should control the construction of the other. Furthermore, it may well be doubted whether this decision is consistent with the spirit of a ruling of the same court in the case of *Henry v. A. B. Dick Co.*<sup>7</sup> In that case it was held that although the patentee had passed title to an article, he could still require by notice that it be used only with certain designated supplies. True, the exclusive right to use, and the exclusive right to vend are separate rights;<sup>8</sup> but in view of the ruling as to the extent of the patentee's power over the use of an article and the similar treatment of these rights in the common law, it would seem that Congress also intended to give to the patentee the right to control the vending of the article even after he had once sold it.

In view of this decision, however, it is an important problem confronting business men whether a patentee can in any way legally restrict the price which the ultimate consumer will pay.<sup>9</sup> It is entirely proper for the manufacturer to retain title, and by making agency contracts with retailers control the retail price;<sup>10</sup> but such a system is often impracticable.<sup>11</sup> If the manufacturer wishes to pass title, a single contract with the purchaser not to sell below a certain price is legal<sup>12</sup> in the case of ordinary articles of commerce. And this would seem equally true of patented articles. In the case of goods made under a secret process, systems of contracts with all purchasers and sub-purchasers to control the retail price have been held illegal at common law and under the

<sup>4</sup> *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722.

<sup>5</sup> *New Jersey Patent Co. v. Schaefer*, 178 Fed. 276; *The Fair v. Dover Mfg. Co.*, 166 Fed. 117; *Automatic Pencil Sharpener Co. v. Goldsmith Bros.*, 190 Fed. 205. The law in England is in accord with this view. *National Phonograph Co. of Australia v. Menck*, [1911] A. C. 336.

<sup>6</sup> Revised Statutes, § 4884.

<sup>7</sup> 224 U. S. 1, 32 Sup. Ct. Rep. 364. For a discussion of this case, see 25 HARV. L. REV. 641.

<sup>8</sup> See *Adams v. Burke*, 17 Wall. (U. S.), 453, 456.

<sup>9</sup> For a discussion of the policy of allowing such control, see 26 HARV. L. REV. 128.

<sup>10</sup> *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747.

<sup>11</sup> A more simple though less effective method would be for the patentee to cease selling to a retailer who cut the price or who continued to sell to those who cut prices. This would probably also be legal.

<sup>12</sup> *Garst v. Harris*, 177 Mass. 72; *John D. Park & Sons Co. v. National Wholesale Druggists Association*, 175 N. Y. 1, 67 N. E. 136.

Sherman Act, as an unreasonable restraint of trade.<sup>13</sup> While recognizing that a legal monopoly exists while the goods are in the hands of the maker, it is argued that it is against public policy to allow the monopoly to continue beyond the first sale. It is said that at the time of this sale the goods pass outside the monopoly, and that a system of contracts limiting the revending illegally restrains trade.<sup>14</sup> In view of the fact that a manufacturer might refuse to sell any goods at all, it is difficult to see how a control over the later sales can be more objectionable, as a restraint of trade, than the original monopoly. It would seem, then, unreasonable to arbitrarily limit the monopoly to the first sale. However, under this decision probably a similar system of contracts as to patented articles would be held illegal. The tendency of the courts, therefore, is to make effective control of the resale price of patented articles practically impossible.

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EXTENSION OF THE FEDERAL POWER OVER INTERSTATE COMMERCE UNDER THE PURE FOOD AND DRUGS ACT. — The effect of the decision in the case of *McDermott v. State of Wisconsin*, 228 U. S. 115 on the extension of federal power under the Pure Food and Drugs Act is of more than passing importance. The act<sup>1</sup> provides that misbranded articles shall be contraband and subject "to be proceeded against and seized" while still "unloaded, unsold, or in their original and unbroken packages"; and by a decision of the Secretaries of the Treasury, Agriculture, and Commerce and Labor, as empowered under the act,<sup>2</sup> a certain type of label was declared to be lawful for syrup mixtures.<sup>3</sup> Now a Wisconsin statute was passed declaring punishable the use of any label other than a certain described one. The defendant had on his shelves, unpacked from their original packages and ready for sale, cans of syrup mixtures with federal labels attached. These labels did not comply with the state statute, and the defendant, being prosecuted thereunder, raised the question of constitutionality of the state statute. The Supreme Court of the United States held that the use of any label in interstate commerce other than that ratified in the decision of the Secretaries, was unlawful, and that therefore the Wisconsin statute was unconstitutional, even in its application to goods not in their original packages. The court based its decision on the ground of the necessity for keeping the federal label on the packages even after the goods are taken from their original pack-

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<sup>13</sup> *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 31 Sup. Ct. 376. See 24 HARV. L. REV. 244, 680. The English view is opposed to this. See *Elliman v. Carrington*, [1901] 2 Ch. D. 275. An effort has been made to distinguish this case as not involving a system of contracts.

<sup>14</sup> Where the contracts are made by the manufacturer of ordinary chattels of commerce, it may be doubted whether the same result would be reached. Where other makers freely compete in the same kind of goods, it can hardly be said that there is a monopoly at any time except in so far as every manufacturer has a monopoly of the goods he makes. See *Park v. Hartman*, 153 Fed. 24, 42, 17 HARV. L. REV. 415.

<sup>1</sup> 34 Stat. at L. 768.

<sup>2</sup> *Supra*, 768.

<sup>3</sup> See 228 U. S. 127.



ages, in order to give the federal officers proper opportunity for the inspection necessary to the enforcement of the act.<sup>4</sup>

Although no absolute rule may be laid down, it is safe to say that a *bonâ fide* police regulation is not unconstitutional under the commerce clause if it does not directly regulate or obstruct interstate commerce,<sup>5</sup> or conflict with any federal statute.<sup>6</sup> Clearly apart from the Pure Food and Drugs Act the Wisconsin statute as applied to goods after they have been taken from their original packages does not, in the light of former decisions,<sup>7</sup> directly hinder or obstruct interstate commerce. Under the construction given by the court to the Pure Food and Drugs Act and to the decision of the Secretaries of the Treasury, Agriculture, and Commerce and Labor, mentioned above, the Wisconsin statute does conflict with the federal act. It is submitted, nevertheless, that another construction is possible. The effect of the act in itself is merely to declare that misbranded and certain other articles shipped through interstate commerce are contraband. So, also, the decision of the Secretaries declaring a certain label to be lawful<sup>8</sup> can mean simply what it says, and not necessarily that it is the only lawful and proper label. For a state to require the setting out on the label of the contents of a package in more detail would not seem to conflict with the stipulations of the federal statute thus construed, if such a label as required was also a proper and correct brand. The federal act in its broad construction cuts deeply into the police power of the states. This was a power reserved to the states by the Constitution, and it seems only fair that, in so far as it is practicable, a state should be allowed to decide for itself what is detrimental and how it will protect itself.<sup>9</sup> As a practical matter also, local police regulations are far more efficient than federal laws, which can hardly fit all the different conditions existing in our wide expanse of territory.<sup>10</sup> For these reasons, in construing such a statute as the Pure Food and Drugs Act, it is submitted that a construction which will allow proper scope to the police power of a state is the one to be followed. On such a construction the Wisconsin statute as shown above would be no direct burden on interstate commerce, and instead of conflicting would be an aid to the

<sup>4</sup> Interstate commerce has usually been understood to cease when the goods are mixed with the general mass of intrastate goods. Taking goods out of their original packages has been used as a rough general test for determining when this happens. See *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *License Cases*, 5 How. (U. S.) 504; *Purity Extract and Tonic Co. v. Lynch*, 226 U. S. 192; *Leisy v. Hardin*, 135 U. S. 100; *Shollenberger v. Pennsylvania*, 171 U. S. 1; *Savage v. Jones*, 225 U. S. 501. The decision of the court in the principal case clearly shows that the federal control may be extended indirectly beyond the original package line, but does not necessarily extend the actual limits of interstate commerce.

<sup>5</sup> *Purity Extract and Tonic Co. v. Lynch*, *supra*; *Austin v. Tennessee*, 179 U. S. 343; *Savage v. Jones*, *supra*.

<sup>6</sup> *Southern Ry. Co. v. Reid*, 222 U. S. 424; *Northern Pacific R. Co. v. Washington*, 222 U. S. 370; *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426.

<sup>7</sup> *Purity Extract and Tonic Co. v. Lynch*, *supra*; *License Cases*, *supra*; *Austin v. Tennessee*, *supra*.

<sup>8</sup> "We have given careful consideration to the labeling, . . . of thick viscous syrup . . . In our opinion it is lawful to label this syrup as corn syrup, and if there is added . . ., the mixture in our judgment is not misbranded if labeled corn syrup with cane flavor . . ."

<sup>9</sup> See 20 Case and Comment, 310.

<sup>10</sup> *Lochner v. New York*, 198 U. S. 45.

enforcement of the federal act, because the state, in enforcing its own law, would be enforcing the federal act also.

The decision, however, may perhaps be supported on another ground. To justify, as a police regulation, a restriction of liberty or the taking of private property without compensation, under the Fourteenth Amendment, the purpose of the statute must be to afford some reasonably necessary protection against dangers, frauds, vice, or oppression. It would seem arguable, at least until the goods were sold, that the federal act would afford as efficient protection against fraud as this Wisconsin statute.<sup>11</sup> If this is so, the Wisconsin statute would seem unnecessary, and would result in deprivation of property and abridgment of freedom without due process of law and therefore would be unconstitutional.

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INCIDENTS OF PROCEDURE UNDER PENAL STATUTES. — The fear of oppression at the hands of the sovereign, and the odium attaching to criminal proceedings, together with the disadvantage under which the accused labors both as to counsel and as to his prejudicial position in the court room, collectively seem to be the bases of the common law and constitutional safeguards in criminal cases.<sup>1</sup> These immunities in favor of the accused have therefore logically no place in a proceeding to enforce a statute under the terms of which the penalty does not inure to the state;<sup>2</sup> for the right to punish and to pardon is then not in the sovereign but in the individual suing for the penalty.<sup>3</sup> The same seems true of *qui tam* actions, where the informer is entitled to part of the fine, since the state has divested itself of the right to remit the whole penalty.<sup>4</sup> These privileges, on the other hand, seem equally inapplicable under a statute providing for enforcement by means of a civil action. For it was the very form of a criminal prosecution which called the safeguards into requisition. In *United States v. Regan*, 203 Fed. 433 (C. C. A., Second Circ.), under a statute providing for the punishment of the importation of aliens by means of a civil action for the penalty, at the suit of the United States or an informer, the court held that proof beyond a reasonable doubt was necessary. Such a ruling would seem incorrect by the above reasoning. The court reached its result apparently because the act forbidden was called a misdemeanor by the statute. Now in a civil suit it is frequently necessary for the plaintiff to prove an act which is in itself a crime, but this does not necessarily require its proof beyond

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<sup>11</sup> The Wisconsin statute says in substance that syrup mixtures containing more than seventy-five per cent glucose, shall be labelled "Glucose flavored with Sugar-cane Syrup . . .," and "shall have no other designation or brand."

<sup>1</sup> See 1 WHARTON, CRIMINAL EVIDENCE, 10 ed., § 1.

<sup>2</sup> *Town of Partridge v. Snyder*, 78 Ill. 519; *United States v. Laescki*, 29 Fed. 699; *Phillips v. Bevans*, 23 N. J. L. 373.

<sup>3</sup> Where the right of action is in a municipal corporation, the principle would seem to be the same. *City of Greensburgh v. Corwin*, 58 Ind. 518. But it should be observed that the language of a particular charter may render the enforcement of a municipal ordinance a criminal proceeding. In the matter of *Querrero*, 69 Cal. 88.

<sup>4</sup> *United States v. Griswold*, 30 Fed. 762; *State v. Williams*, 1 Nott & McC. (S. C.) 26.



a reasonable doubt. True, the argument has often been advanced that the criminal character of the *factum probandum*, necessitated proof beyond a reasonable doubt, but the great weight of authority holds that where the proceedings are civil a preponderance of the evidence is enough. Thus it is generally held that only a preponderance of evidence is necessary in bastardy proceedings, in civil actions to enjoin a private nuisance, to set aside fraudulent conveyances, to recover the proceeds of money stolen by the defendant, in actions for seduction, and pleas of truth in actions for defamatory charge of crime, or of arson in actions on insurance policies.<sup>5</sup> Consequently the according to a defendant of common law and constitutional privileges does not depend on the nature of the *factum probandum*, but on the particular form, whether civil or criminal, in which the issue is raised.

Where the destination of the whole penalty is the state treasury, and where no particular form of action is specified, it is often very difficult to know what type of enforcement is contemplated by the legislators.<sup>6</sup> The intent may be to relieve the wrongdoer from the ignominy of a criminal prosecution. Any attempt to use the inherent character of the act as a test to determine how the statute was to be enforced overlooks the peculiarity of statutory law that the mode of punishment is not what a reasonable third person deems just, but exclusively what the legislators choose to make it.<sup>7</sup> Whether the punishment threatens the life or liberty of the offender has also been suggested as a criterion.<sup>8</sup> But the fact that so many offenses which entail punishments no severer than the pecuniary loss usual in civil suits are admittedly prosecuted as crimes seems to show the unsoundness of this test.<sup>9</sup> Also a provision for imprisonment in the statute is not decisive. Imprisonment on execution is wholly distinct in its nature from imprisonment on arrest, as is shown by the fact that the sovereign's pardon is of no avail in the former.<sup>10</sup> No general test seems possible.<sup>11</sup> Whether a statute gives

<sup>5</sup> Bastardy proceedings: *State v. Severson*, 78 Ia. 653, 43 N. W. 533; *State v. Nichols*, 29 Minn. 357, 13 N. W. 153; *Bell v. State*, 124 Ala. 94, 27 So. 414; *People v. Christman*, 66 Ill. 162; *Knowles v. Scribner*, 57 Me. 495; *Dukehart v. Caughman*, 36 Neb. 412, 54 N. W. 680. *Contra*, *Norwood v. State*, 45 Md. 68; *Van Tassel v. State*, 59 Wis. 351, 18 N. W. 328; *State v. Rogers*, 119 N. C. 793, 26 S. E. 142. Private nuisance: *State v. Collins*, 68 N. H. 299, 44 Atl. 495. Fraud: *Carter v. Gunnels*, 67 Ill. 270; *Sommer v. Oppenheim*, 44 N. Y. Supp. 396, 19 Misc. Rep. 605. See *contra*, *Bessey v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 141 N. W. 244 (Wis.). Stolen money: *Nebraska National Bank v. Johnson*, 51 Neb. 546, 71 N. W. 294. Seduction: *Nelson v. Pierce*, 18 R. I. 539, 28 Atl. 806. Defamatory charge of crime: *Ellis v. Buzzell*, 60 Me. 209; *Finley v. Widner*, 112 Mich. 230, 70 N. W. 433. Arson: *Blackburn v. St. Paul F. & M. Ins. Co.*, 116 N. C. 821, 21 S. E. 922; *First National Bank v. Commercial Assurance Co.*, 33 Or. 43, 52 Pac. 1050.

<sup>6</sup> *Att'y Gen. v. Bradlaugh*, 14 Q. B. D. 667; *Att'y Gen. v. Radloff*, 10 Ex. 84.

<sup>7</sup> See SUTHERLAND, STATUTORY CONSTRUCTION, §§ 6 ff.

<sup>8</sup> *Toledo, P. & W. Ry. Co. v. Foster*, 43 Ill. 480; *Palmer v. People*, 109 Ill. App. 269.

<sup>9</sup> The earliest notions of criminal law were doubtless colored by the harshness of the old punishments, but this barbarity had vanished long before our modern constitutions and statutes favoring the accused. See 10 Am. Law Rev. 642.

<sup>10</sup> *Quigley v. Aurora*, 50 Ind. 28; *Campion v. Gillan*, 79 Neb. 364, 112 N. W. 585.

<sup>11</sup> It has further been suggested that in ambiguous cases the statute is criminal or not according to whether it prohibits, or merely states the penalty attaching to certain acts. *In re Seagraves*, 4 Okla. 422, 430, 48 Pac. 272, 274; see also SEDGWICK, CON-

rise to a civil cause or to a criminal cause must in the last analysis depend upon its particular wording and upon the customary mode of enforcement of similar statutes in the particular jurisdiction.

**EQUITABLE CONVERSION AS RELATING TO OPTIONS.** — In the ordinary case of an absolute contract to buy and sell land, Equity, looking to substance rather than to form, as it is said, regards the purchaser as owner and the vendor as having merely a claim for money with the legal title as security. If both the vendor and the purchaser die intestate immediately after the contract is made the vendor leaves, in substance, a claim for money which would devolve to his personal representatives and his heirs would hold the legal title in trust for them.<sup>1</sup> The purchaser's rights, being realty in substance, devolve to his heirs.<sup>2</sup>

Where, however, the contract is enforceable only on motion of the purchaser, as, for example, where an option is given, the vendor, if he dies before it is exercised, would seem to leave to his heirs both the legal and the equitable title. He has no claim for the purchase price, and so leaves none to his personal representatives. It would seem best that the rights of the heir and the personal representatives of the vendor should be settled once and for all at the vendor's death.<sup>3</sup> A subsequent exercise of the option, with its consequent actual conversion of the land of the deceased into money, should not divest the heirs.<sup>4</sup> Such a rule would be harmonious with other cases of equitable conversion where rights once vested remain fixed despite subsequent changes in form.<sup>5</sup> It is not contrary to any expressed intention of the testator. It is easy of application and does not change the feudal classification of property by giving realty to the personal representatives. A possible objection is, that it leaves out of account the probable intention of the deceased. His exact intention is unexpressed, but it would be proper for a court to lay down a rule to carry out the probable intent in the greatest number of cases.<sup>6</sup> Thus in the case of an absolute contract the deceased vendor has manifested an intention to convert realty into personalty, and so by a test based upon intention, also, the personal representatives would

STRUCTION OF STATUTORY AND CONSTITUTIONAL LAW, 2 ed., 77. But the extreme infrequency of the latter type would seem to show that the legislators attached no decisive meaning to words of prohibition.

<sup>1</sup> Bubb's Case, Freem. 38.

<sup>2</sup> Milner v. Mills, Moseley 123; Moore v. Burrows, 34 Barb. (N. Y.) 173. These conversions have been thought by some authorities to be fictitious and unnecessary. See Lysaught v. Edward, 2 Ch. D. 499, 510; LANGDELL, in 18 HARV. L. REV. 246. But it is so well established that it must be accepted.

<sup>3</sup> Currie v. Bawyer, 5 Beav. 6; Keep v. Miller, 42 N. J. Eq. 100; Leiper's Appeal, 35 Pa. St. 420.

<sup>4</sup> Smith v. Lowenstein, 50 Oh. 346. See Rockland-Rockport Lime Co. v. Leary, 203 N. Y. 469, 478, 97 N. E. 43, 45. Graves v. Graves, 15 Ir. Ch. 357, and Re Walker's Estate, 17 Jur. 706, although purporting to be consistent with Lawes v. Bennett, 1 Cox Ch. 167, distinguish it in a very unsatisfactory way.

<sup>5</sup> Curteis v. Wormwald, 10 Ch. D. 172; Ackroyd v. Smithson, 1 Bro. Ch. 503.

<sup>6</sup> See Rockland-Rockport Lime Co. v. Leary, 203 N. Y. 469, 481, 97 N. E. 43, 46; Mayer v. Gowland, 2 Dick. 563, 565; Weeding v. Weeding, 1 Johns. & H. 424, 430; LANGDELL, in 18 HARV. L. REV. 246.



be entitled. Also an option to sell, given by the deceased, manifests a desire to convert his property into personalty, whether or not the option is later exercised. Giving effect to such desire would entitle the personal representatives to land. If the option was never exercised, this would result in a clear violation of all principles of devolution, since realty would descend to the personal representatives. Moreover, the facts in each case would urge a modification of any set rule.<sup>7</sup> Yet this could not be allowed without violating the Wills Act.

The weight of authority on this point follows the leading case of *Lawes v. Bennett*,<sup>8</sup> and adopts a middle ground, differing from either of the solutions suggested.<sup>9</sup> If the option is not exercised, the heir takes and retains the land; but if the option is exercised, the heir gets the rents and profits until the exercise of the option and then the proceeds go to the personal representatives. A recent case is in accord with this view, *McCutcheon's Estate*, 61 Pitts. Leg. J. 315. So vacillating a rule has obvious objections. To have the ultimate ownership unsettled indefinitely, conceivably for generations, is impracticable and unjust.<sup>10</sup> Many cases that follow this rule, in deference to the great authority of Lord Kenyon, have doubted it on theory.<sup>11</sup> If the rule is founded on reason, it should be applied also in the cases where the purchaser waives the breach of a condition by the vendor; yet it is limited to cases of options.<sup>12</sup> Moreover, even in cases of options, the personal representatives take nothing if there be a specific devise instead of a general devise or intestacy.<sup>13</sup> This may be distinguished, however, since, if the devise be specific and made after the option is given, the testator has expressed an intention to benefit the devisee to that extent. This doctrine, then, involved in *Lawes v. Bennett*, has been limited to those facts regardless of similarity in principle.<sup>14</sup> Such exceptions are simply examples of limiting the application of a bad rule of law.

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THE OWNERSHIP OF LAND UNDER WATERS. — While it is a well-recognized rule of law that land under navigable<sup>1</sup> waters belongs to the sovereign, and land under non-navigable waters to the riparian

<sup>7</sup> Thus, where the option is incidental to a long term or perpetual lease, the lessor can scarcely be said to have manifested an intention to convert. See *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, 481, 97 N. E. 43, 46. Also, if an option is followed by a specific devise, a desire not to convert is shown.

<sup>8</sup> 1 Cox Ch. 167.

<sup>9</sup> *Townley v. Bedwell*, 14 Ves. Jr. 590; *In re Isaacs*, [1894] 3 Ch. 506.

<sup>10</sup> *Smith v. Lowenstein*, 50 Oh. 346. See *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, 478, 97 N. E. 43, 45.

<sup>11</sup> See *Townley v. Bedwell*, 14 Ves. Jr. 591, 596; *Collingwood v. Row*, 3 Jur. N. S. 785, 786; *Edwards v. West*, 7 Ch. D. 858, 863; *In re Walker's Estate*, 17 Jur. 706.

<sup>12</sup> *Thomas v. Howell*, 34 Ch. D. 166.

<sup>13</sup> *Drant v. Vause*, 1 Y. & C. Ch. 580; *Emuss v. Smith*, 2 DeG. & Sm. 222; *In re Pyle*, [1895] 1 Ch. 724.

<sup>14</sup> *Edwards v. West*, 7 Ch. D. 858.

<sup>1</sup> The word "navigable" as a term of this rule of law is not necessarily bound up with actual navigability. It is merely a convenient technical term to signify the criterion for the sovereign's ownership of subaqueous land. When used in this technical sense it is often spoken of as "navigable in law." See *Miller v. State*, 124 Tenn. 293-300, 137 S. W. 760, 761; *FARNHAM, WATERS*, § 38.

owners,<sup>2</sup> the decisions are not uniform as to what tests determine navigability. Under the English rule, only waters affected by the ebb and flow of the tide are navigable in law.<sup>3</sup> In America, many courts have said that the term navigable "includes" any waters in fact suitable for travel.<sup>4</sup> The Supreme court of Tennessee has extended this latter rule to include waters capable of being made suitable for travel. *State v. West Tennessee Land Co.*, 158 S. W. 746 (Tenn.).

The cause of this diversity of opinion is probably historical. The English rule that only land under the sea belongs to the crown would seem to be based on reason. The use of the seashore and the right to land, fish, and gather sea animals was considered important in early times. To facilitate this it was necessary that the crown should own the land between the high and low water marks, and it was a natural conception that the land under the sea should belong to the crown. These reasons being inapplicable in the case of inland waters in England, title to land under them was rightly allowed to pass to the riparian owner. As the tidal waters in England are, in fact, the only ones capable of much travel, the courts unfortunately adopted the word "navigable" as a convenient technical term to signify those waters under which the king owns the bed. When the question arose in America some courts, in applying the general rule, seem to have taken the word "navigable" literally;<sup>5</sup> and, considering the meaning given the term in England inapplicable to this country, extended the term "navigable" so as to include the large inland rivers and lakes. One idea in their doing so seems to have been to secure the public a right of way over waters navigable in fact. They seemed unable to reconcile private ownership of the bed with a public right to travel over the water. It seems perfectly clear, however, that this departure was unnecessary if merely to secure the public a general right to navigate. The public can clearly have a right to travel on<sup>6</sup> or fly over<sup>7</sup> land, the fee of which is in private individuals; and a number of courts have allowed the same right over water without considering state ownership of the bed necessary to reach that result.<sup>8</sup>

But in spite of the different opinions prevailing as to what waters are navigable in the technical sense, the actual decisions are not so very much in conflict. Few of them have been direct adjudications of title, and of these, many that have held title to be in the state are explainable by looking to the circumstances connected with the grants.<sup>9</sup> In view

<sup>2</sup> *Cobb v. Davenport*, 32 N. J. L. 369; *Lembeck v. Nye*, 47 Oh. St. 336, 24 N. E. 686; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548; *Lamprey v. Metcalf*, 52 Minn. 181, 53 N. W. 1139.

<sup>3</sup> *Smith v. Andrews*, [1891] 2 Ch. Div. 678, 693.

<sup>4</sup> See *Heyward v. Farmer's Mining Co.*, 42 S. C. 138, 150, 19 S. E. 963, 970; *Hurst v. Dana*, 86 Kan. 947, 950, 122 Pac. 1041, 1042; *Broward v. Mabry*, 58 Fla. 398, 409, 50 So. 826, 830.

<sup>5</sup> See *Johnson v. Johnson*, 14 Id. 561, 571, 95 Pac. 499, 502.

<sup>6</sup> *State v. Laverack*, 34 N. J. L. 201; *Smith v. San Luis Obispo*, 95 Cal. 463, 30 Pac. 591.

<sup>7</sup> Cf. *Pickering v. Rudd*, 1 Stark. 56; *Clifton v. Viscount Bury*, 4 T. L. R. 8.

<sup>8</sup> *Treat v. Lord*, 42 Me. 552; *Moore v. Sanborn*, 2 Mich. 519.

<sup>9</sup> In some cases the deed expressly limits the property by a meander line. *Johnson v. Knott*, 13 Ore. 308, 10 Pac. 418. In Washington the constitution has declared all rights to subaqueous lands to be in the state. *Brace & Hergert Mills Co. v. State*,



of the actual decisions, therefore, a uniform test for navigability seems possible, although the diversity of views expressed by the courts makes such a result improbable. The English rule holding that only land under tidal waters belongs to the sovereign, coupled with a public right to travel over actually navigable waters, is based on reason, is comparatively easy of application, and has been adopted by a number of American jurisdictions.<sup>10</sup> It is submitted that it is much more desirable than a test making land titles depend on the uncertainties as to actual navigability,<sup>11</sup> which is neither based on fundamental reason nor necessary to secure the rights of the public.

## RECENT CASES.

ADMIRALTY — TORTS — LIMITATION OF LIABILITY OF FOREIGN SHIP-OWNERS. — The owners of the British steamship "Titanic" petition to limit their liability under the Act of March 3, 1851, U. S. REV. STAT. §§ 4282-4289, for losses resulting from the collision of the ship with an iceberg in mid-ocean. *Held*, that the English, not the American, law governs. *The Titanic*, 49 N. Y. L. J. 685 (U. S. Dist. Ct.).

The limitation of liability for collisions on the high seas in American law is based wholly on statute. In the case of *The Scotland*, 105 U. S. 24, the American statute, as the law of the forum, was held applicable to a collision between an American and an English ship. The law of the forum was also applied where a Belgian and a Norwegian vessel collided. *The Belgenland*, 114 U. S. 355. In both cases, however, exceptions were indicated. If the laws limiting liability for collisions were the same in the countries to which two foreign ships of different nationalities belonged, the law of the forum would yield to the law of the flag; *a fortiori*, if the vessels belonged to the same foreign country. These seem correct on the theory that the same or similar foreign law has followed both ships. Logically, the case of an English ship stranding on English soil comes within such a rule. *Contra*, *The State of Virginia*, 60 Fed. 1018. The case of an English ship, striking an iceberg, is an equally clear case for applying the law of the flag. A broad construction, in substance making the act a mere procedural limitation in favor of all ship-owners sued in federal courts, has been given to the Harter Act, which creates a similar limitation of liability for loss due to faulty navigation. *The Chattahoochee*, 173 U. S. 540. Such an interpretation, however, has never been put upon the Act of 1851.

42 Wash. 326, 95 Pac. 278. A number of decisions in the northwestern states have been based on the idea that the meander lines of the federal surveys were necessarily the boundaries of riparian property. See *Kinhead v. Turgeon*, 74 Neb. 573, 109 N. W. 744. As to the Great Lakes, it would seem that a reasonable construction of grants conveying property bordering thereon would make the shore line the boundary. In many other cases historical reasons have decided the titles, as, for example, royal grants, etc. But it would seem that decisions of this sort would not be inconsistent with a uniform test for navigability, however conflicting the language used by the courts may be.

<sup>10</sup> *Kinhead v. Turgeon*, 74 Neb. 573, 109 N. W. 744; *Cobb v. Davenport*, 32 N. J. L. 369; *Lattig v. Scott*, 17 Id. 506, 107 Pac. 47; *Farris v. Bentley*, 141 Wis. 671, 124 N. W. 1003; *Hardin v. Jordan*, 140 U. S. 371, 11 S. Ct. 808; *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626, 30 N. W. 469; *Browne v. Chadbourne*, 31 Me. 9.

<sup>11</sup> See *Hurst v. Dana*, 86 Kan. 947-964, 122 Pac. 1041-1047.

**AGENCY — AGENTS' LIABILITY TO THIRD PERSONS — LIABILITY ON CONTRACT FOR PARTLY UNDISCLOSED PRINCIPAL.** — The defendant, a hotel porter, called the plaintiff, a cabman, for a customer who later changed his mind and refused to take the cab. *Held*, that the plaintiff may recover. *Isaacs v. Allen*, 48 L. J. 501.

The facts show that an action on the contract by the third party against the agent of a partly undisclosed principal is anomalous and not based on any real agreement between the parties. It is, however, well established law. *Argersinger v. Macnaughton*, 21 N. E. 1022, 114 N. Y. 535; *Horan v. Hughes*, 120 Fed. 248, 1005. It can be said in favor of this action that it works practical justice by offering the third party some other security than the credit of an unknown principal. The present defendant might well have been relieved, however, on the ground that he acted as an automaton, or messenger, rather than as an agent; and that no reliance was placed on his responsibility for the performance of the contract.

**BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — LIFE INSURANCE POLICIES.** — A bankrupt had a life insurance policy payable to his executors, administrators, or assigns, which, however, had been pledged to the amount of its cash surrender value. Section 75 a (5) of the Bankruptcy Act provides that by paying his trustee the cash surrender value of his policy he may retain it. *Held*, that the policy does not pass to the trustee. *Burlingham v. Crouse*, 33 Sup. Ct. 564. 20

The court proceeds upon the theory that as the bankrupt is to keep his interest over and above the cash surrender value, there is no occasion here for paying anything, because he has not any interest up to that amount. A decision to the same effect when the principal case was in the lower court was approved in 24 HARV. L. REV. 317.

**CARRIERS — DISCRIMINATION AND OVERCHARGE — RIGHT TO COLLECT BALANCE OF LEGAL RATE FROM CONSIGNEE WHEN LOWER RATE WAS ORIGINALLY CHARGED.** — The plaintiff collected from the defendant by mistake an amount lower than the rate published in accordance with the Interstate Commerce Act. The consignee was the commission agent of the consignor and had already accounted to his principal, — this relationship being unknown to the plaintiff when the goods were delivered. The plaintiff now sues the consignee for the balance of the legal rate. *Held*, that the plaintiff cannot recover. *Pennsylvania R. Co. v. Titus*, 142 N. Y. Supp. 43 (App. Div.).

In Massachusetts a case arose having exactly the same facts as those in the New York case above. *Held*, that the plaintiff can recover. *New York, N. H. & H. R. Co. v. York & Whitney Co.*, 102 N. E. 366 (Mass.).

When a carrier by mistake, or even intentionally, quotes a lower rate than that published in accordance with the provisions of section 6 of the Interstate Commerce Act (*Act Feb. 4, 1887, C. 104, 24 Stat. 380; Amend. Act, June 29, 1906, C. 3591, 34 Stat. 586*), the carrier can demand the lawful rate before surrendering the goods. *Gulf, etc. Ry. v. Hefley*, 158 U. S. 98; *Southern Ry. v. Harrison*, 119 Ala. 539, 24 So. 552. It can sue for the unpaid balance after the goods have been delivered. *Union Pacific R. Co. v. American Smelting & Refining Co.*, 202 Fed. 720. And the carrier is not liable to the shipper for negligence in quoting the lower rate. *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242; *Illinois Central R. Co. v. Henderson Elevator Co.*, 226 U. S. 441. Upon a true analysis the rights and liabilities of employer and carrier arise by way of relation and not by way of contract. See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 331 *et seq.* Therefore whoever enters into a relation with a carrier must pay the legal freight rate, since this payment is one of the duties incident to the relation. Any contract for a lower rate does not alter this duty,



as the statute is construed. The relation of carrier and employer between the company and the consignor is not exclusive of the same relation between the company and the consignee. The consignor may be bound by the tender of the goods for carriage. *Great Western Ry. Co. v. Bagge*, L. R. 15 Q. B. D. 625. The consignee may be bound by the acceptance of the goods. *Union Pacific R. Co. v. American Smelting & Refining Co.*, *supra*; *Davison v. City Bank*, 57 N. Y. 81. See 2 HUTCHINSON, CARRIERS (3 ed.), § 807 *et seq.* The fact that the consignee is the agent of the consignor does not prevent the relationship from arising unless the carrier knew this fact, since the identity of the employer depends upon the reasonable impression of the carrier. *Sheets v. Wilgus*, 56 Barb. 662. The court in the New York case admits the liability of the consignor for the full legal rate, but denies the liability of the consignee for any amount in excess of the freight bill. The consignee entered the relationship just as did the consignor, and if he is bound at all, why is he not bound to the same extent as the consignor? *Union Pacific R. Co. v. American Smelting & Refining Co.*, *supra*. It is difficult to see any reason why the consignee and not the consignor can employ as a defense either a contract to carry at an illegal rate or an estoppel which would force the plaintiff to do that which he is forbidden by statute. This would seem more clearly true, since in both cases the bill of lading said, "Owner or consignee shall pay freight." The result of the Massachusetts case seems necessary to preserve the integrity of the act.

CARRIERS — PERSONAL INJURIES TO PASSENGERS — INSULTS BY A SERVANT. — In response to the plaintiff's demand for a seat on the defendant's train, the conductor in a sarcastic manner said in the hearing of other passengers that he would ask a lady friend of his to give up hers. *Held*, that the plaintiff may recover for mental humiliation and also have punitive damages. *Cave v. Seaboard Air Line Ry.*, 77 S. E. 1017 (S. C.).

For a discussion of the principles involved see 15 HARV. L. REV. 670. The decided cases relate to insults of a somewhat coarser kind. The allowance of punitive damages in the principal case is an eloquent tribute to South Carolina chivalry.

CONFLICT OF LAWS — REMEDIES: PROCEDURE — STATUTORY TORT — ACTION BARRED BY LIMITATION CLAUSE IN STATUTE. — A statute in Illinois gave a right of action for death by wrongful act, but provided that such action must be brought within a year. The plaintiff brought suit in Iowa upon the Illinois statute, but amended his declaration in an essential particular after the year had passed. By Illinois decisions the amendment as well as the original declaration had to be filed within a year, or else the action was held not to have been brought within the year. *Held*, that the action was commenced within the year. *Knight v. Moline, E. M. & W. Ry. Co.*, 140 N. W. 839 (Ia.).

In general, statutes of limitation affect the remedy only, not the right. Therefore an action barred by the *lex loci* may be maintained in a foreign state if not barred by the law of that state. *Le Roy v. Crowninshield*, 2 Mason 151, Fed. Cases 8, 269; *Finch v. Finch*, 45 L. J. Ch. N. S. 816. But where the statute creating the right of action also prescribes a time within which suit must be brought, the limitation is a condition of the cause of action and the expiration of the period extinguishes the right. *Davis v. Mills*, 194 U. S. 451, 24 Sup. Ct. Rep. 692; *Boyd v. Clark*, 8 Fed. 849. Thus the limitation in this class of cases, being one of substantive law, is governed by the *lex loci delicti*. *Boston and Maine R. R. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615; *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140. Questions of procedure, however, are necessarily decided by the *lex fori*. *Bank of United States v. Donnelly*, 8 Pet. 361; *Heaton*

v. *Eldredge*, 36 Ohio St. 87. 46 N. E. 638. "Commencement" of an action is a term of art in the law of procedure, and consequently the question of when an action based upon an amended pleading is commenced, is governed by the Iowa law. *Bank of United States v. Donnelly*, *supra*. Once admitting the propriety of deciding this question by the *lex fori*, the substantive law of Illinois as to limitation is in no way violated, since the action is begun within the year. Therefore the decision of the principal case seems correct.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — SERVICE UPON A CORPORATION OUTSIDE OF STATE. — Under a statute in South Dakota, providing for service of process upon corporations, in an action for damages for breach of contract to convey land, service was made on the defendant, a domestic corporation of South Dakota, by delivery of summons and complaint at the Iowa residence of the treasurer, the other officers of the corporation having resigned. *Held*, that the service was due process of law to support a default judgment. *Straub v. Lyman Land & Investment Co.*, 141 N. W. 979, S. C. 138 N. W. 957 (S. D.).

Interpreting the statute as authorizing service "within or without" the state in such a case, the court argues that a domestic corporation is always resident and within the jurisdiction of the state. Hence service of process amounts to a mere notice of an action to give an opportunity to defend the same. Any reasonable means of notification may be authorized, since there is no attempt to cite into court any individual outside of the court's jurisdiction. The conclusion of the court, however, may be reached in a less involved way. Corporations are artificial units created by legislative act. Any state may prescribe its own terms for admitting foreign corporations within its territorial limits. *Philadelphia Fire Association v. New York*, 119 U. S. 110; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181. By statute the powers and control of domestic corporations may be revised by subsequent legislation. And a reasonable method of service may therefore be established by the state as a term of the continued existence of a domestic corporation. Now provisions for service upon a corporation are in substance provisions for substituted service. Hence service by publication or by mailing a copy of summons to the office of the corporation has been upheld as reasonable. *Clearwater Merc. Co. v. Roberts, etc. Shoe Co.*, 51 Fla. 176. 40 So. 436; *Nelson v. C. B. & A. R. Co.*, 225 Ill. 197, 80 N. E. 109. Consequently the power of the state should extend to providing such reasonable procedure for creatures of its own legislature, as was provided in the principal case.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES: CLASS LEGISLATION — CITIES CLASSIFIED FOR PURPOSES OF ELECTION LAW. — The Pennsylvania constitution prohibited "local or special" legislation regulating the holding of elections. A statute provided for the government of cities having less than a given population by a commission to be chosen by a special process of non-partisan election. *Held*, that the statute is constitutional. *Commonwealth ex rel. Jackson v. Corl*, 61 Pitts. Leg. J. 513 (Pa. C. P.); *Commonwealth ex rel. Kessler v. Moore*, 61 Pitts. Leg. J. 481 (Pa. C. P.). *Contra*, *Commonwealth ex rel. Vannatta v. Fayette County Commissioners*, 61 Pitts. Leg. J. 465 (Pa. C. P.).

A law is general if it applies one rule to all like cases: it is local or special only if it treats differently cases between which there is no "substantial distinction having a reference to the subject matter" of the law. See *State ex rel. Richards v. Hammer*, 42 N. J. L. 435, 440; *People ex rel. Davis v. Nellis*, 249 Ill. 12, 23, 94 N. E. 165, 170. What are substantial distinctions between cases justifying different legal results can be determined only by the judgment born of experience. A court, confronted with this question, can do no more



than decide whether, in the light of its judicial knowledge, the distinction drawn by the statute seems reasonable. No rational ground suggests itself for confining non-partisan elections to cities of any particular size, as such. *Wanser v. Hoos*, 60 N. J. L. 482, 38 Atl. 449. But cf. *State ex rel. Crow v. Fleming*, 147 Mo. 1, 44 S. W. 758; *Ladd v. Holmes*, 40 Ore. 167, 66 Pac. 714. But population furnishes a basis for differences in organization. Hence commission government may be confined to cities of a certain size. *State ex rel. Hunt v. Tausick*, 64 Wash. 69, 116 Pac. 651. Since commission government requires non-partisan officers more imperatively than does the bicameral system, it would seem that non-partisan elections in commission-governed cities may co-exist with partisan elections in cities differently organized consistently with the constitutional requirement of uniformity. If so, the present statute should be sustained.

CORPORATIONS — TORTS AND CRIMES — CRIMINAL LIABILITY OF CORPORATION — CRIMINAL ACT OF AGENT FORBIDDEN BUT WITHIN SCOPE OF AUTHORITY. — The defendant's agent aided in the sale of liquor, contrary to the U. S. PENAL CODE, § 239. This was within the scope of the agent's authority, but was forbidden by the defendant's regulations. The jury were charged that the defendants were criminally responsible for such acts. *Held*, that the instruction was wrong. *John Gund Brewing Co. v. United States*, 204 Fed. 17.

There is a tendency at present to hold a corporation criminally liable even where *mens rea* is required. See 20 HARV. L. REV. 321; 22 HARV. L. REV. 537. While courts may have been loath to impose the stigma of criminality on an individual for the fault of his agent, no such considerations apply to corporations where a conviction can result only in a fine.

CRIMINAL LAW — PLEAS — WITHDRAWAL OF PLEA OF GUILTY. — The defendants in a criminal prosecution were induced to plead guilty, by the representation of the prosecuting attorney that the court would impose a light sentence. A heavy sentence, however, being imposed, the defendants moved for permission to withdraw the plea and plead not guilty. The trial court denied the motion. *Held*, that the sentence be vacated and the defendants permitted to withdraw the plea. *Griffin v. State*, 77 S. E. (Ga.) 1080.

The plea of guilty, being a confession in open court and a waiver of trial, has always been received with great caution. The court must see that the defendant thoroughly understands the situation and acts voluntarily before receiving it. *Gardner v. People*, 106 Ill. 76; *State v. Stephens*, 71 Mo. 535. Whenever the accused through ignorance, fraud, or intimidation has been induced to plead guilty he should be permitted to withdraw the plea. *Myers v. State*, 115 Ind. 554, 18 N. E. 42; *Swang v. State*, 2 Cold. (Tenn.) 212. This may be done at the discretion of the trial court before sentence. *Rex v. Plummer* [1902], 2 K. B. 339. In some jurisdictions this right is granted by statute. *State v. Kraft*, 10 Ia. 330; *People v. Richmond*, 57 Mich. 339, 24 N. W. 124. The same reasons would apply in favor of withdrawing a plea of guilty after sentence, and in America it is generally permitted. *City of Salina v. Cooper*, 45 Kan. 12, 25 Pac. 233; *Little v. Comm.* 142 Ky. 92, 133 S. W. 1149. *Contra, Regina v. Sell*, 9 Car. & P. 346. Whether this is so far within the court's discretion as not to be subject to review by an appellate court is a question of local practice. In some jurisdictions such rulings by the lower court are not open to review. *Comm. v. Tucker*, 189 Mass. 457, 76 N. E. 127. But judicial discretion is not usually regarded as an arbitrary power. *State v. McNally*, 55 Md. 559. Where the circumstances are such as to make the ruling of the lower court in denying the motion a clear abuse of its discretion, the ruling should be subject to review on appeal. *Deloach v. State*, 77 Miss. 691, 27 So. 618; *City of Salina v. Cooper*, *supra*. See 14 HARV. L. REV. 609.

**DAMAGES — MENTAL DISTRESS AS ELEMENT OF DAMAGE — PARASITIC DAMAGES IN ACTION OF TRESPASS.** — The plaintiff's landlord, wrongfully entering her premises, frightened her badly by a violent disturbance. There was no physical injury either simultaneous with the fright or resulting from it. *Held*, that in an action for the wrongful entry the plaintiff may recover for her mental suffering. *Nordgren v. Lawrence*, 133 Pac. 436 (Wash.).

The principal case does not involve the question of whether mental suffering is sufficient damage to sustain a cause of action for negligence without physical impact. *Cf. Spade v. Lynn & Boston R. Co.*, 168 Mass. 285. It rests on the principle, now quite widely accepted, that where an independent cause of action exists, mental suffering is a proper element of damage. *Bouillon v. Laclede Gaslight Co.*, 129 S. W. 401, 148 Mo. App. 462; *Tennessee Cent. R. Co. v. Brasher's Guardian*, 97 S. W. 340, 29 Ky. Law Rep. 1277. A common illustration is a suit for wrongful ejection from railway premises under humiliating circumstances. *Davis v. Tacoma Ry. & Power Co.*, 77 Pac. 209, 35 Wash. 209. Another is the mutilation or the disinterment of a corpse. *Larson v. Chase*, 50 N. W. 238, 47 Minn. 307. The limitation, that the mental suffering must have been wilfully inflicted, seems to be applied in some jurisdictions. *Wyman v. Leavitt*, 71 Me. 227; *Buchanan v. Stout*, 108 N. Y. Supp. 38. It is submitted that this is incorrect. Granting that the act was wrongful in the legal sense, and that fright is damage, the plaintiff should recover for all proximate mental suffering. The danger, made much of in analogous cases, of a multitude of groundless suits based on mental injury alone is not present here, since the plaintiff is already in court on a good cause of action. *Cf. Spade v. Lynn & Boston R. Co.*, 168 Mass. 285; *Dulieu v. White*, 2 K. B. 669. The fact that such damages would not have been allowed in a technical action of trespass does not seem to trouble modern courts.

**DEATH BY WRONGFUL ACT — DAMAGES IN STATUTORY ACTION — RIGHT OF DAUGHTER NOT SUPPORTED BY FATHER, TO SUE FOR HIS DEATH.** — An administratrix sues under the Employers' Liability Act for death negligently caused. One of the beneficiaries was a married daughter who had not been supported by the deceased. *Held*, that there can be no recovery for the benefit of the non-dependent child. *Gulf, Colorado, & Santa Fe R. Co. v. McGinnis*, 228 U. S. 173.

This case is interesting as showing that the Supreme Court regards recovery under the Employers' Liability Act as a new right given to the beneficiaries through the administrator as representative, and not as a right left as a legacy by the deceased. It being a right of the beneficiaries, damage to them must be shown for a recovery. For a discussion of the principles here involved, see 21 HARV. L. REV. 636.

**DEATH BY WRONGFUL ACT — DEFENSES TO STATUTORY LIABILITY — EFFECT OF CONTRIBUTORY NEGLIGENCE OF BENEFICIARY.** — Under the New York statute an administrator sues a street railway company for negligently causing the death of his intestate. The administrator was the sole beneficiary under the death statute, and his negligence had contributed to the disaster. *Held*, that the plaintiff may recover. *McKay v. Syracuse Rapid Transit Co.*, 101 N. E. 885 (N. Y.).

There are two types of death statutes. When the right of action is given to the next of kin as such, it is law everywhere that his contributory negligence will bar. *St. Louis, I. M. & S. R. Co. v. Freeman*, 36 Ark. 41; *Baltimore & Ohio R. Co. v. The State*, 30 Md. 47. When the right of action is given to the administrator for the benefit of the next of kin, here again the weight of authority is that the contributory negligence of the beneficiary is a bar. *Richmond, etc. R. Co. v. Martin's Adm'r*, 102 Va. 201. In a few jurisdictions, however,



the right of action is regarded as if it were that of the deceased, and recovery is allowed in spite of the beneficiary's contributory negligence. *Warren v. Manchester St. Ry.*, 70 N. H. 352, 47 Atl. 735; *Wymore v. Mahaska Co.*, 78 Ia. 396. The decision of the principal case settles the New York law, which had previously been in an uncertain state, in favor of recovery by the negligent beneficiary. On theory the recovery is essentially a compensation to the next of kin, the interposition of the administrator being a mere matter of procedure. This is further illustrated by the refusal to allow one not dependent on the deceased to recover under the federal statute. See 27 HARV. L. REV. 87. To allow this recovery when the beneficiary has been guilty of contributory negligence is to compensate him at the expense of his co-tortfeasor. See 21 HARV. L. REV. 636.

FEDERAL COURTS — JURISDICTION AND POWERS IN GENERAL — JURISDICTION WHERE STATE COURT INTERPRETS FEDERAL STATUTES TOO BROADLY. — The plaintiff as administratrix sued the defendant company for damages occasioned by the death of her husband while in its service, relying upon the federal "Hours of Service Act" and "Employer's Liability Law." The defendant requested a verdict directed in its favor, which was refused. A judgment for the plaintiff was affirmed by the Supreme Court of Kentucky. 145 Ky. 427, 140 S. W. 672. The defendant now seeks a writ of error from the United States Supreme Court. *Held*, that the Supreme Court has jurisdiction. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 33 Sup. Ct. 858.

When an action is begun in a federal court the case may be taken directly to the Supreme Court upon any constitutional question, irrespective of the lower court's decision. Act of March 3, 1891, c. 517, § 5; 26 STAT. AT LARGE, 828. But a writ of error to a state court can only be had when a party claims and is denied some federal right. U. S. REV. STAT, § 709; U. S. COMP. STAT. 1901, 575; JUDICIAL CODE, § 237. The original purpose of allowing the Supreme Court this power of review was to prevent impairment of federal authority. See *Commonwealth Bank of Ky. v. Griffith*, 14 Peters (U. S.), 56, 58. Where the federal right is sustained, there is no necessity for review upon this score, and it was felt that to allow either party to appeal might put too much power in the hands of the federal courts. *Gordon v. Caldcleugh*, 3 Cranch (U. S.), 268; *Missouri v. Andriano*, 138 U. S. 496. See *Hale v. Gaines*, 22 Howard (U. S.), 144, 160. But fear of encroachment on state power by federal courts is now past. Indeed it has been felt desirable that legislation be enacted giving both parties the right to come before the Supreme Court on a federal question, in order to secure prompt and uniform construction of federal statutes. See PROCEEDINGS OF AMERICAN BAR ASSOCIATION, 1911, 462, 469. The serious objection to the proposal is the consequent addition to the work of an already over-burdened Supreme Court. See PROCEEDINGS OF AMERICAN BAR ASSOCIATION, *supra*, 482. To justify the decision in the principal case, the statute involved would have to be said to give or secure rights to both parties. Language, in previous cases, might lay a foundation for the construction that each party has a right to have his rights under the statute construed by the Supreme Court. *Seaboard Air Line Ry. v. Dwall*, 225 U. S. 477, 486, 32 Sup. Ct. 790; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 293, 28 Sup. Ct. 616. This seems hardly a permissible construction in the light of the above cases, especially as the defendant claimed the benefit of no exception or proviso.

HISTORY OF LAW — PROCEDURE AND COURTS — RIGHT OF COURT TO HEAR NULLITY SUIT IN CAMERA. — A proceeding to nullify a marriage on the ground of the husband's impotence was heard in camera by order of the judge. Later the wife to protect her reputation secured transcripts of the evidence given and

sent them to various persons. For this she was found guilty of contempt. She now appeals to the House of Lords. *Held*, that the court had no jurisdiction to hear nullity suits in camera. *Scott v. Scott*, [1913] A. C. 417.

In early England the general public were required to pay a fee to gain admission to a court of law. 2 Bouvier's Law Dictionary (Rawle's edition), 548. But common-law courts are today generally open to the public. Nullity proceedings, however, were heard originally in the ecclesiastical courts, where witnesses were examined in private and their evidence taken by depositions. See SHELFORD, MARRIAGE AND DIVORCE, p. 522; CONSET, ECCLES PRACTICE, pt. 3, c. 4, § 3. (5). In 1857 such proceedings were transferred by statute to a new court of "Divorce and Matrimonial Causes." 20 & 21 VICT. c. 85, § 6. At first some doubt was expressed as to this court's right to conduct proceedings in private as the ecclesiastical courts had done. *Barnett v. Barnett*, 29 L. J. (P. & M.) 28 (1859); *H (falsely called C) v. C*, 1 Sw. & Tr. 605, 29 L. J. (P. & M.) 29 (1859). Later, however, it was decided that by § 22 of the act this new court inherited that power. See *C v. C*, L. R. 1 P. & M. 640 (1860); *A v. A*, L. R. 3 P. & M. 230 (1875); *D v. D*, [1903] P. 144. The present decision in turn overthrows this ruling. The House of Lords reasons that while § 22 declares the new court shall proceed as nearly as possible according to the rules of the former ecclesiastical courts, that § 46 providing that witnesses shall "be sworn and examined orally in open court" abolishes the practice of private examination and proceedings. In view of the express language of § 22, however, a better construction of § 46 would seem to be that while the cumbersome and expensive practice of taking depositions is to be changed to the more convenient *via voce* testimony before a judge, the right of the judge to hear the testimony in private is not thereby abolished. But viewed merely as a common-law question it would seem that any court should have power at its discretion to hear in private testimony demoralizing to the public or embarrassing to a testifying witness. The House of Lords denies any such discretionary right, but lays down as a rule that private hearings should be given only in cases where the attainment of justice would otherwise be rendered doubtful. If this includes only cases of wardship, lunacy, and trade secrets, where private hearings have always been given, the rule laid down seems too narrow. Construed broadly, however, this language amounts practically to the granting of a discretionary power. Already this interpretation has been adopted by the English divorce court in a subsequent case where the public were ejected because a witness was visibly embarrassed by their presence. *Moosbrugger v. Moosbrugger*, 1913 T. L. R. 658. The House of Lords seems to fear that injustice may be caused by granting private hearings. But this objection is hardly valid where, as in the principal case, both parties desire such form of proceeding. In the United States divorce proceedings in many jurisdictions are regulated by statute. See *Cross v. Cross*, 55 Mich. 280; *Hobart v. Hobart*, 45 Ia. 501. But elsewhere it would seem that a judge should at least have the right in his discretion to hear such cases in private if the parties desire it.

HOMICIDE — DEFENSES — PROVOCATION — ILLICIT INTERCOURSE OF BETROTHED. — The defendant killed his betrothed in a passion aroused by her confession of illicit intercourse during their engagement. Under the instructions the jury was not permitted to reduce the crime to manslaughter on this account. *Held*, that the charge, in substance, was correct. *King v. Palmer*, [1913] 2 K. B. 29.

The existence of malice aforethought in a homicide case is as properly a matter of fact for the jury as the doing of the act. *Maher v. People*, 10 Mich. 212; see 1 EAST P. C. 222. But the English judges early laid down a rule which forbade the jury to infer absence of malice aforethought from the pro-



vocation offered by words of infamy or reproach. *Mawgridge's Case*, 17 Cobbett's St. Tr. 57. Words, which, in contradistinction to abusive epithets, are a mere vehicle to convey intelligence of the fact which actuates the crime, were not included in the original rule. So where the homicide of the husband is reduced by his having come upon his wife in the adulterous act, her confession of misconduct is recognized as having the same effect. See *Reg. v. Rothwell*, 12 Cox C. C. 145; *Rex v. Jones*, 72 J. P. 215. It is submitted that this should not be arbitrarily restricted to the case of a wife, but that where the killing immediately follows the discovery of a fiancée in such an act, or her confession of it, the jury should be permitted to find an absence of malice aforethought. The result which the court achieves can only be explained as a blind application of the rule of thumb that words in themselves are not sufficient provocation.

HUSBAND AND WIFE — RIGHTS AND LIABILITIES OF WIFE AS TO THIRD PARTIES — ALIENATION OF AFFECTION — NECESSITY OF MALICE. — The plaintiff's husband was induced to leave her, as a result of advice given to him by the defendant. The court below refused to instruct the jury that the wife need not prove malice on the part of the defendant in order to recover. *Held*, that the refusal was correct. *Geronimi v. Brunelle*, 102 N. E. 67 (Mass.).

Most jurisdictions now extend to a wife the protection which has always been afforded a husband in the analogous case, holding that she has a property right in the *consortium* of her spouse, for the deprivation of which she may bring suit under the married women's enabling acts. *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842. The intervention of the husband's voluntary act does not break the causation, for a result intended by the defendant cannot be considered remote. *Lumley v. Gye*, 2 E. & B. 216; *Angle v. Chicago, St. Paul, Minn., & Omaha Ry. Co.*, 151 U. S. 1. A *prima facie* case thus having been made against him an affirmative justification is required of the defendant. *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598; *Walker v. Cronin*, 107 Mass. 555. Such justification has been universally predicated upon the affection which binds a parent and child or upon the duties of a guardian to his ward. *Huling v. Huling*, 32 Ill. App. 519; *Tucker v. Tucker*, 74 Miss. 93, 19 So. 955. But in the principal case there is no relationship upon which such a justification can be based. A true analysis of cases of this character shows that malice or motive becomes important only where there is a justification to be negatived. *Williams v. Williams*, 20 Col. 51, 37 Pac. 614; *Gernerdt v. Gernerdt*, 185 Pa. 233. However, the principal case seems to stand for the novel proposition that good motive in itself justifies a *prima facie* wrong, which has been repudiated in the analogous case of procuring the breach of a contractual right. *S. W. Miners' Federation v. Glamorgan Coal Co.*, L. R. (1905) A. C. 239. There seems to be no logical reason for distinguishing the two wrongs so as to make such a fundamental difference in the nature of the defenses allowed.

ILLEGAL CONTRACTS — CONTRACTS SUPPORTED BY AN ILLEGAL OR IMMORAL CONSIDERATION — CESSATION OF ILLICIT COHABITATION — The plaintiff, having lived in illicit cohabitation with the defendant, agreed under seal to pay over to him certain money. This seems to have been in return for the defendant's promise to marry her. The defendant refused to marry her, and the plaintiff seeks to have the agreement to pay the money cancelled. *Held*, that cancellation will not be decreed, the contract being void. *Pepperas v. Le Duc*, 24 O. W. R. 563, 4 O. W. N. 1208.

Where future illicit cohabitation is the consideration for a contract, such is void as against public policy. *Potter v. Gracie*, 58 Ala. 303. But a promise made during illicit cohabitation is not necessarily tainted. *McGuitty v. Wilhite*,

247 Mo. 163, 152 S. W. 598. However, past illicit cohabitation is not sufficient consideration to support a promise. *Binnington v. Wallis*, 4 B. & Ald. 650. Nor will the moral obligation arising from such be good consideration. *Eastwood v. Kenyon*, 11 A. & E. 438. But if supported by other good consideration, or under seal, such a contract is enforceable. *McGuilly v. Wilhite*, *supra*; *Brown v. Kinsey*, 81 N. C. 245. *A fortiori*, a promise made in consideration of the cessation of past illicit cohabitation is not void for illegality, there being nothing in such a promise contrary to public policy, but rather otherwise. A contract made to end these relations by marriage, as a matter of policy, should be even more favorably regarded by the law. *Holchkins v. Hodge*, 38 Barb. (N. Y.) 117. Clearly such a contract is valid from the point of view of consideration, since both sides agree to do something they are not bound to do. It is submitted, therefore, that the court erred in concluding that the agreement was void.

**INJUNCTION — ACTS RESTRAINED — FORMER EMPLOYEE SOLICITING OLD CUSTOMERS FOR RIVAL.** — The plaintiff laundry company employed the defendant as a collector and gave him lists of certain of its customers. The defendant agreed not to solicit these customers for any other concern. Later he left the plaintiff's employ and began to canvas the same customers for a rival laundry. *Held*, that the defendant will be enjoined from soliciting or receiving laundry from any of the above customers. *Empire Steam Laundry v. Lozier*, 130 Pac. 1180 (Cal.).

The court disregards the agent's contract with the plaintiff and grants the injunction on the broad ground of preventing a breach of fiduciary duty. In closely analogous cases injunctions were granted against disclosure of trade secrets, on that ground. *Morison v. Moat*, 9 Hare 241; *Peabody v. Norfolk*, 98 Mass. 452. True, some courts in these cases find an implied contract not to disclose, or argue that trade secrets are property rights which equity protects; but the first explanation is a mere fiction, and the "property right" is protected against violation by the fiduciary only. See 11 HARV. L. REV. 262. On the grounds of a fiduciary relationship, the disclosure of confidential communications by an attorney, or the use and publication of private codes by one other than the originator, have been enjoined. *Evitt v. Price*, 1 Sim. 483; *Simmons Hardware Co. v. Waibel*, 1 So. Dak. 488, 47 N. W. 814. *Contra*, *Reuter's Telegram Co. v. Byron*, 43 L. J. Ch. 661. Similarly the use of lists of customers may be enjoined. *Robb v. Green*, [1895] 2 Q. B. 1; *Stevens v. Stiles*, 29 R. I. 399, 71 Atl. 802. *Cf. Lamb v. Evans*, [1893] 1 Ch. D. 218. But the principal case not merely prohibits the use of the plaintiff's lists, but enjoins all soliciting of customers whose names appeared there. The question, however, is substantially the same whether the agent makes use of the lists themselves, or of knowledge which he has acquired from them. The test in either case should be whether the lists were given to the agent in a fiduciary capacity. This is a question to be determined from the facts of the particular case, and any breach of the duty so imposed should be restrained. *Witkop & Holmes Co. v. Boyce*, 64 Misc. (N. Y.) 374, 118 N. Y. Supp. 461; *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379.

**INJUNCTIONS — ACTS ENJOINED — SUIT IN FOREIGN JURISDICTION.** — The plaintiff had brought an action against the defendant in New York. While this was still pending, the plaintiff brought another action against the defendant on the same cause of action in North Carolina, the defendant's domicile. The defendant seeks an injunction restraining the plaintiff from further prosecution of the New York suit, on the ground that an attachment had been wrongfully sued out in New York and that there had been no personal service on the defendant in that state. *Held*, that the injunction will not be granted. *Carpenter, Baggott & Co. v. Hanes*, 77 S. E. 1101 (N. C.).

Formerly the view prevailed that a court of equity would never enjoin the



further prosecution of a suit commenced in a foreign jurisdiction. *Love v. Baker*, Freem. Ch. 125, 1 Ch. Cas. 67; *Carroll v. The Farmers' & Mechanics' Bank*, Har. (Mich.) 197; *Mead v. Merritt*, 2 Paige (N. Y.) 402. This view apparently obtains in Illinois to-day, on the ground that any other rule would be inconsistent with interstate harmony. *Harris v. Pullman*, 84 Ill. 20. This does not seem to follow, however, as the court of equity is not interfering with another state's proceedings; it is simply laying a personal prohibition upon the defendant. See 2 STORY, EQUITY JURISPRUDENCE, 13 ed., § 899. This is generally agreed to-day, and if necessary, courts will enjoin such suits. *Lord Portarlington v. Soulby*, 3 Mylne & Keen 104; *Kempson v. Kempson*, 58 N. J. Eq. 94. See 15 HARV. L. REV. 145. But in the absence of fraud or manifest injustice, the court will generally, in its discretion, refuse to interfere, as its decree may come into conflict with one rendered in the other state. *Carson v. Dunham*, 149 Mass. 52, 20 N. E. 312; *The Bank of Bellows Falls v. The Rutland & Burlington R. Co.*, 28 Vt. 470. In the principal case there would seem to be no such fraud or inequity as would justify the granting of the decree, and the case could be disposed of on this ground. But the court refuses the injunction because the defendant is not domiciled in North Carolina, reasoning that the jurisdiction of equity to enjoin a foreign suit is based on the theory that a resident of a state owes obedience to that state and that the state has a right to control his personal relations with other citizens of the state. This doctrine of allegiance is important in Roman law, but has no place in our law. See HOLLAND, ELEMENTS OF JURISPRUDENCE, 9 ed., 401. What the court probably means to say is that since an injunction can act only *in personam*, it should not be issued unless the court has some means of enforcing its decree. If the defendant is not domiciled in the state and has no property in the state which can be sequestered, the court has no means of rendering its decree effective and therefore the decision in the principal case seems clearly correct.

INSURANCE — RIGHTS OF APPLICANT — COMPANY LIABLE FOR AGENT'S FAILURE TO FORWARD APPLICATION. — The agent of the defendant insurance company negligently failed to forward to its home office an application for life insurance signed by the plaintiff's intestate a month before his death. But for this neglect the plaintiff's intestate would have been insured by the defendant. Held, that the plaintiff may recover in tort. *Duffie v. Banker's Life Ass'n of Des Moines*, 139 N. W. 1087 (Iowa).

The court reasons that because the defendant solicited business "under a franchise from the state," it was bound to give prompt attention to all applications. But the mere soliciting of an offer creates no duty to consider it. *Harris v. Nickerson*, L. R. 8 Q. B. 286. And the alleged franchise consists simply in the defendant's charter and license to write insurance. This license, like those issued to physicians, is a mere certificate of compliance with the police regulations governing the defendant's business. *Commonwealth v. Vrooman*, 164 Pa. 306, 320, 30 Atl. 217, 220. Certainly neither such a license nor a corporate charter imposes, without more, a duty to serve the public. Nor is the insurance business in itself a public calling. Any applicant may be rejected, even under statutes forbidding discriminatory rates. See *Queen Insurance Co. v. State*, 86 Tex. 250, 270, 24 S. W. 397, 404. Cf. CODE OF IOWA, 1907, § 1782. No public duty, therefore, bound the defendant to consider this application. On the other hand, any person who, at another's request, enters upon the transaction of business in his behalf, is liable, though unpaid, for negligence, even though it be non-feasance, in executing his commission. *Robinson v. Threadgill*, 13 Ired. (N. C.) 39; *Johnston v. Graham*, 14 U. C. C. P. 9. *Coadon v. Exter-Hall Brokerage Agency*, 142 N. Y. Supp. 548. In filling out an application the agent acts on behalf of the company. *Union*

*Mutual Life Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222. *A fortiori* he does so in undertaking to forward it to headquarters. It follows that when the defendant, through its authorized agent, received the application for transmission to its home office, it became liable for failure to transmit it, in accordance with the principle stated above. This liability, since it grew out of the relation of agency toward the applicant, which the defendant assumed, sounds in tort. *Robinson v. Threadgill*, *supra*. There is no logical difficulty in a corporation's becoming bound to submit an offer to one of its own departments when it has actually undertaken so to do. The principal case therefore seems correctly decided. *Boyer v. State Farmer's Mut. Hail Ins. Co.*, 86 Kan. 442, 121 Pac. 329.

**LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — EFFECT ON PRINTER OF MALICE IN AUTHOR.** — The plaintiff sued jointly the author and the printer of a certain pamphlet, for defamatory statements therein contained. The occasion was privileged as regards the author, but he was actuated by malice. There was no malice in the printer. *Held*, that both were jointly liable. *Smith v. Streetfield*, 29 T. L. R. 707.

The publisher and the author of defamatory matter can be sued jointly for the publication. *Munson v. Lathrop*, 96 Wis. 386, 71 N. W. 596. Such a publication is actionable *per se*, subject, however, to such defenses as truth and privilege. *Bromage v. Prosser*, 4 B. & C. 247; *Ullrich v. New York Press Co.*, 23 Misc. (N. Y.) 168, 50 N. Y. Supp. 788. The reasoning of the present case is not free from the confusion which has followed the doctrine of legal malice, and its rebuttal by proof of privilege. See *Jackson v. Hopperton*, 12 Wkly R. 913. The result can be reached by straightforward reasoning without reverting to any such antique fiction. See 60 Univ. of Pa. L. Rev. 365. In the principal case the printer published at his peril. He himself had no defense of privilege. Had there been no malice, he would have acquired a *prima facie* defense by virtue of the author's privilege. *Baker v. Carrick*, [1894] 1 Q. B. 838. But there was malice in the author, hence the author's *prima facie* defense of privilege fell. *Stevens v. Sampson*, 5 Ex. D. 53. Thus having no defense himself, and acquiring none from the author, the printer's absolute liability remained, making him jointly liable.

**NEGLIGENCE — DEFENSES — ILLEGAL ACT OF PLAINTIFF.** — The plaintiff while riding in an unregistered automobile, was injured at a railroad crossing through the negligence of the defendant railroad. *Held*, that the plaintiff may recover. *Lockbridge v. Minneapolis & St. L. Ry. Co.*, 140 N. W. 834 (Ia.).

The plaintiff's intestate while acting as engineer of the defendant's train was killed when the engine left the track. Although the rail was defective, the accident would not have occurred had the deceased not been exceeding the speed limit of four miles an hour fixed by a municipal ordinance. *Held*, that the plaintiff may not recover. *Southern Ry. Co. v. Rice's Adm'x*, 73 S. E. 592 (Va.).

The weight of authority holds that a plaintiff's breach of a criminal statute is equivalent to contributory negligence. *Newcomb v. Boston Protective Department*, 146 Mass. 596; *Weller v. Chicago, M. & St. P. Ry. Co.*, 120 Mo. 635, 23 S. W. 1061. The plaintiff, however, is barred only when his act is the legal cause of the injury. *Berry v. Sugar Notch Borough*, 191 Pa. 345, 43 Atl. 240. Upon consideration merely of causation the Iowa case, where the plaintiff's act was mere collateral wickedness, correctly permitted recovery; while the opposite result seems proper in the Virginia case, where the statutory breach contributed directly to the wreck. But because of other considerations the correctness of each case is doubtful. In the Iowa case the plaintiff could not recover if regarded as a trespasser, unless wilfully or wantonly mistreated. *Gwynn v. Duffield*, 66 Ia. 708, 24 N. W. 523. The Massachusetts court



has reached a result squarely opposed to the Iowa case, by holding an unregistered automobile a trespasser, although there also the plaintiff was a trespasser as against the defendant only because of the defendant's rights upon the highway by virtue of the public easement. *Dudley v. Northampton St. Ry. Co.*, 202 Mass. 443, 89 N. E. 25; *Chase v. New York Central & H. R. R.*, 208 Mass. 137, 94 N. E. 377. Other courts are not inclined to hold an unlicensed automobile a trespasser. *Hemming v. City of New Haven*, 82 Conn. 661, 74 Atl. 892; *Atlantic C. L. R. Co. v. Weir*, 63 Fla. 69, 58 So. 641. An analogy which would argue against recovery in the Iowa case is to be found in the cases which hold that one traveling contrary to a Sunday statute is so far an outlaw that no duty of care as to the highway is owed him. *Johnson v. Irasburg*, 47 Vt. 28. Where the accident was the result of collision and not of derailment the courts have held that the plaintiff's breach of a statute, similar to the one in the Virginia case, prevented his recovery. *Missouri, K. & T. Co. v. Roberts*, 46 S. W. 270 (Tex.); *Little v. Southern Ry. Co.*, 120 Ga. 347, 47 S. E. 953. However, in the principal case the speed ordinance of four miles an hour was passed undoubtedly to protect wayfarers, not to prevent engine derailment. Now when a defendant violates a statute irrelevant to the injury resulting, the breach is not held negligence. *Gorris v. Scott*, L. R. 9 Exch. 125. The courts have generally disregarded this distinction in the case of plaintiffs. *Contra, Watts v. Montgomery Traction Co.*, 57 So. 471 (Ala.). It is submitted that there is no sufficient reason for a different test for plaintiffs than defendants, and that the plaintiff should not be barred by his breach of a statute not passed to prevent the injury sustained.

OFFER AND ACCEPTANCE — UNILATERAL CONTRACTS — MISTAKE IN TRANSMISSION OF OFFER BY TELEGRAPH COMPANY. — The defendant incorrectly transmitted the specifications in the plaintiff's telegraphic order for machinery. The addressee accepted the offer according to the altered specifications. The plaintiff received the machines and paid the price. Subsequently the plaintiff took an assignment of, and now sues on, the addressee's rights against the defendant. Held, that the plaintiff may recover. *Jackson Lumber Co. v. Western Union Tel. Co.*, 62 So. 266 (Ala.).

The responsibility of an offeror for a telegraphic offer delivered in an altered form has been much disputed. Many courts deny his liability. *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783. But the weight of authority supports the better view, namely, that the offeror's intent as expressed to the reasonable offeree must govern, and that a valid contract arises on the acceptance of the offer received. *Haubelt v. Rea, etc. Mill Co.*, 77 Mo. App. 672. See 24 HARV. L. REV. 244. The sender may then hold the telegraph company directly for his loss. *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495. The principal case, however, assumes that there is no contract and allows the sender to recover on the assignment of the addressee's right of action in tort against the defendant for the damage suffered in acting upon a telegram negligently transmitted. *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298. See 19 HARV. L. REV. 474. The introduction of this tort liability in favor of the addressee as the basis of the action is, at best, difficult to support on legal theory. *Dickson v. Reuter's Tel. Co.*, L. R. 3 C. P. D. 1. In the principal case, moreover, the action would fail for want of damage to the addressee if the sender were held to the contract, or if the payment made should be construed as mitigating the addressee's damages instead of subrogating the plaintiff to the addressee's rights.

PARENT AND CHILD — ABDUCTION OF CHILD — RELATION OF MASTER AND SERVANT NOT ESSENTIAL TO RECOVERY. — In an action by a father for the abduction of a child of seven years, the complaint contained no allegation of loss

of service. *Held*, that a demurrer on that ground should have been overruled. *Howell v. Howell*, 78 S. E. 222 (N. C.).

Originally a father's action for the abduction of a child seems to have included only cases of abduction of an heir, in whose marriage he had a valuable right. See 3 BL. COM. 140; *Barham v. Dennis*, Cro. Eliz. 770. Subsequently he was allowed an action for injury to his parental rights by the fiction, *per quod servitium amisit*. *Tullidge v. Wade*, 3 Wils. 18. See also *Norton v. Jason*, Styles 398; *Russell v. Corne*, 2 Ld. Ray. 1032. American courts have recognized a right of recovery for the expense of caring for an injured child on the ground of his obligation to care for his offspring. *Dennis v. Clark*, 2 Cush. (Mass.) 347; *Contra, Grinnel v. Wells*, 7 M. & G. 1033. See *Hunt v. Wotton*, T. Ray. 259, 260. With this exception protection of his parental rights is extended to him as master rather than as father. *Whitbourne v. Williams*, [1901] 2 K. B. 722. English courts, though recognizing this rule as a mere fiction, have at times applied it stringently. *Grinnel v. Wells*, *supra*; *Hamilton v. Long*, [1903] 2 I. R. 407, [1905] 2 I. R. 552. American decisions are more liberal. *Martin v. Payne*, 9 Johns. (N. Y.) 387; *Parker v. Meek*, 3 Sneed (Tenn.) 29; *Magee v. Holland*, 27 N. J. L. 86. Universal recognition of the injury to parental rights as the basis for assessing damage lessens the injustice but not the absurdity of the fiction. *Bedford v. McKowl*, 3 Esp. 119; *Phelin v. Kenderdine*, 20 Pa. 354. Even courts that go far in deploring the technicality still feel themselves bound by it. *Washburn v. Abram*, 122 Ky. 53, 90 S. W. 997. The principal case is a distinct step forward. Two jurisdictions have like rules. *Kirkpatrick v. Lockhart*, 2 Brev. (S. C.) 276; *Anthony v. Norton*, 60 Kan. 341, 56 Pac. 529. In another the rule is statutory with regard to actions for seduction. *How. St. (Mich.)*, 2 ed., 13133.

PARTNERSHIP — RIGHTS AND REMEDIES OF CREDITORS — DISTRIBUTION OF ASSETS OF INSOLVENT PARTNERSHIP AND INSOLVENT DECEASED PARTNERS. — Two partners died insolvent and the partnership was also insolvent. In the probate court the question arose as to the distribution of the assets of the insolvent estates. *Held*, that the partnership creditors be preferred as to partnership assets and share equally with the separate creditors in the distribution of the separate estates. *Robinson v. Security Co.*, 87 Atl. 879 (Conn.).

The principal case departs from the general common-law rule, which is that partnership assets are to be distributed among partnership creditors and separate assets among separate creditors, and the excess of either estate is to be applied to the deficiencies of the other. See *In re Wilcox* (D. C.), 94 Fed. 84. But the general rule neither attains justice nor is it to be supported on any logically developed theory. *Camp v. Grant*, 21 Conn. 41. See 18 HARV. L. REV. 495; 20 HARV. L. REV. 589, 591. The general rule seems to be another of the numerous compromises between the mercantile or entity theory of partnership and the common-law or aggregate theory. If the aggregate theory were followed consistently, the obligations of partnership being merely joint obligations of the several partners, the rule of distribution would be that both partnership creditors and the separate creditors of the individual partners would share equally as well in the separate estates of the partner as in the partner's share of the partnership assets. If we follow the entity theory we reach the result of the principal case, since the firm would be primarily liable to the partnership creditors and the partners individually would be sureties. See article by Brannan, 20 HARV. L. REV. 589, 591; CORY, ACCOUNTS, 2 ed., 124; LINDLEY PARTNERSHIP, 8 ed., 815. The mercantile theory is the result of convenience, logic, and experience, while the common-law theory is a derivative of an imperfect Roman law analogy. See 24 HARV. L. REV. 591, 603. Therefore the latter often breaks down where the two conflict. Thus it would seem that the solution of these difficulties is only to be found by dropping the mask and expressly adopting the entity



theory. 57 CENT. L. J. 343; 2 JURIDICAL SOCIETY PAPERS, 40; 20 HARV. L. REV. 589. The only sound objection to the rule of the principal case is a practical one, in that it differs from that of the Federal Bankruptcy Act which adopts the common-law or English rule. Act July 1, 1898, c. 541, sec. 5, 30 Stat. 547. Thus the rule of distribution would depend upon whether the estates were being settled in the state or the federal court. This objection was thought fatal in England under similar circumstances. *Grey v. Chiswell*, 9 Ves. 118. But since the principal case is a step toward establishing a theory of partnership in accordance with the true facts and at the same time achieves a more just result, it would seem worthy of being followed in spite of the conflict it may create.

PATENTS — INFRINGEMENTS — RIGHT OF SUB-PURCHASER TO DISREGARD NOTICE LIMITING RESALE PRICE. — The purchaser of a patented article from a jobber disregarded a notice, put on the article by the patentee, to the effect that it was not to be resold below a certain price. *Held*, that there was no infringement of the patent. *Bauer & Cie v. O'Donnell*, 33 Sup. Ct. Rep. 616.

This case is commented upon in this issue of the REVIEW on p. 73.

POST OFFICE — USE OF MAILS FOR FRAUDULENT PURPOSE — WHETHER ACTUAL INTENT TO DEFRAUD ADDRESSEE IS REQUIRED. — The defendant sent through the mails a catalogue advertising and soliciting orders for loaded dice and marked cards. He was indicted under a statute providing punishment for anyone who, having devised a scheme to defraud, should for the purpose of executing such scheme place any letter or advertisement in the post office. Act March 4, 1909, c. 321; PEN. CODE, § 215; 35 STAT. AT LARGE, 1130. *Held*, that a demurrer to the indictment should be sustained. *Stockton v. United States*, 205 Fed. 462 (C. C. A., Seventh Circ.).

The court argues that the legislature did not intend the general language of the above section to cover the defendant's offense, because an amendment to the statute as originally framed has made punishable any scheme to use the mails for disposing of counterfeit money or certain other specified artifices which would enable the purchaser to commit a fraud. But an order by mail to sell counterfeit money was punishable under the statute before amendment. *United States v. Jones*, 10 Fed. 469. In a case to the contrary, relied on by the court in the principal case, the decision turned upon a defect in the indictment, which charged a scheme to defraud the man who bought the counterfeits, instead of, as was the case, those who might deal with him. *Milby v. United States*, 109 Fed. 638. See *Milby v. United States*, 120 Fed. 1, 2. The amendment did not curtail the original statute, but simplified the course of conviction for the specified offenses. *Streep v. United States*, 160 U. S. 128; *Culp v. United States*, 82 Fed. 990. See *Milby v. United States*, 120 Fed. 1, 4. Since it is impossible to conceive that the vendor in the principal case had no intention to defraud, the result seems contrary to reason as well as authority.

RECEIVERS — EFFECT OF RECEIVERSHIP ON RELATION OF AGENTS TO COMPANY. — The plaintiff sued the defendant railroad for injuries received before the railroad passed into the hands of receivers. A statute provided that in actions against railroads, process could be served on any of their station or ticket agents. After the receivership, process was served by the plaintiff on a station agent, an employee of the railroad retained by the receiver. *Held*, that the service was valid against the railroad. *Ennest v. Pere Marquette R. Co.*, 142 N. W. 567 (Mich.).

The appointment of a receiver might have one of two possible effects upon the relation of employees to the railroad. They may be held to be agents of the receiver only. *Cain v. Seaboard, etc. Ry.*, 7 Georgia App. 461, 67 S. E. 127.

Or they may continue agents of the company so that service upon an employee is effective to bind the company. *Faltiska v. New York, L. E. & W. R. Co.*, 12 Misc. N. Y. 478, 33 N. Y. Supp. 679, affirmed 151 N. Y. 650, 46 N. E. 1146. That a receivership does not dissolve a corporation is well settled. See *Kincaid v. Dwinelle*, 59 N. Y. 548; *City Water Co. v. State*, 88 Tex. 600, 32 S. W. 1033. Stockholders may hold elections during the receivership. *State ex rel. Atty. Gen. v. Merchant*, 37 Ohio St. 251. The corporation itself must conform to police regulations enacted for public protection. *Ohio & M. R. R. Co. v. Russell*, 115 Ill. 52, 3 N. E. 561. It is liable for torts committed before receivership. *Decker v. Gardner*, 124 N. Y. 334, 26 N. E. 814. The receiver's possession of the property is but temporary. *Robinson v. Atlantic & G. W. Ry. Co.*, 66 Pa. St. 160. The Michigan court seems correct in finding no inconsistency in an agency for the railroad while employees are under the temporary management of the receiver. In the minds of its men and the public at large the road still operates; receivership signifies at most a change in management. Service on such agent meets the test of bringing notice of the suit to the company. See *Coler v. Pittsburgh Bridge Co.*, 84 Hun 285, 286, 32 N. Y. Supp. 439, 440.

**SELF-DEFENSE — NECESSITY CREATED BY DEFENDANT — GOING ARMED NEAR ONE WHO HAS THREATENED.** — In a trial for homicide, the court refused to instruct the jury that the defendant would not be deprived of his right of self-defense although he knew before entering the house of a mutual friend, where the encounter took place, that he would likely meet the deceased there, and that the deceased would likely attack him. *Held*, that the instruction was properly refused. *Valentine v. State*, 159 S. W. 26 (Ark.).

When a defendant enters the presence of one who has threatened him and being attacked kills the threatener, it is not clear on authority under what circumstances he retains his right of self-defense. Where the defendant went into the vicinity of the deceased on a mere pretext, knowing and intending that his presence alone would cause an attack, the excuse has been denied. *State v. Neely*, 20 Ia. 108; *State v. Hawkins*, 18 Ore. 476, 23 Pac. 475. See *Y. B. 21 H. 7*, 39, pl. 50. But a man may, if necessary, arm himself and go about his lawful business, in spite of the probability of thus causing an attempt upon his life, and yet be excused for killing in case of necessity. *People v. Butchelder*, 27 Cal. 69; *State v. Evans*, 124 Mo. 397, 28 S. W. 8. The excuse may well depend on the reason for the defendant's presence at the place. For the welfare of the community it is essential that a man should be free to come and go while concerned with earning his livelihood, but it is not so important that he should be protected in the pursuit of pleasure. See note, 8 HARV. L. REV. 355. The principal case is correct on the ground that the defendant may have been engaged in the pursuit of no legitimate interest to which the law affords such protection. A previous Arkansas case has a contrary tendency. *Nash v. State*, 73 Ark. 399, 84 S. W. 497.

**SPECIFIC PERFORMANCE — LEGAL CONSEQUENCES OF RIGHT OF SPECIFIC PERFORMANCE — RIGHT OF PERSONAL REPRESENTATIVE OF VENDOR TO PURCHASE MONEY AFTER OPTION TO PURCHASE.** — The owner of land leased it for a term of years giving an option to purchase. After his death the option was exercised. *Held*, that the general legatee, and not the heirs, are entitled to the proceeds. *McCutcheon's Estate*, 61 Pitts. Leg. J. 315 (Allegheny Co., 1913). See NOTES, p. 79.

**TELEGRAPH AND TELEPHONE COMPANIES — CONTRACTS AND STIPULATIONS LIMITING LIABILITY — UNREPEATED MESSAGES.** — A mistake due to the negligence of an agent of the defendant occurred in an unrepeatable message sent under a stipulation limiting liability to the amount of the toll charge.



*Held*, that the plaintiff may recover only the limited amount. *Williams v. Western Union Telegraph Co.*, 203 Fed. 140 (Dist. Ct., E. D. Pa.).

The principal case follows the accepted rule of the federal courts. *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. Rep. 1098; *Western Union Telegraph Co. v. Coggin*, 15 C. C. A. 231, 68 Fed. 137. It is also in accord with the weight of general authority. *Halstead v. Postal Telegraph and Cable Co.*, 193 N. Y. 293, 85 N. E. 1078; *Grinnell v. Western Union Telegraph Co.*, 113 Mass. 299. Nearly all jurisdictions, however, disregard the limitation when the act is wilful or grossly negligent. *Dixon v. Western Union Telegraph Co.*, 3 App. Div. 60, 38 N. Y. Supp. 1056; *Redington v. Pacific Postal Telegraph Cable Co.*, 107 Cal. 317, 40 Pac. 432. But several states hold the stipulation invalid for all purposes on the ground that an exemption from liability for negligence in the conduct of a public business will remove a necessary safeguard against deterioration of the service. *Western Union Telegraph Co. v. Chamblee*, 122 Ala. 428, 25 So. 232; *Telegraph Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500. This position seems in harmony with the rule that an exemption from liability for negligence with respect to service within the public obligation is invalid. *Reed v. Western Union Telegraph Co.*, 135 Mo. 661, 37 S. W. 904; *Railroad v. Lockwood*, 17 Wall. (U. S.) 357. The majority of the cases endeavor to avoid a conflict with this rule by calling the repeated message the normal and the unrepeatd message the special service. This reasoning involves the proposition that a company can refuse to transmit unrepeatd messages. This is not justified by authority. *Vermilye v. Postal Telegraph and Cable Co.*, 205 Mass. 598, 93 N. E. 635. Therefore the result reached by the chain of cases to which the principal case adds an additional link is not only unfortunate from the point of view of the public to be served but incorrect, in the light of the general law of public service companies.

**TORTS — LIABILITY OF MAKER OR VENDOR OF A CHATTEL TO THIRD PERSONS INJURED BY ITS USE — EXPLOSION OF GINGER BEER BOTTLE.** — The plaintiff was injured by the explosion of a ginger beer bottle purchased from a vendee of the defendant manufacturing company. The defendant did not know of the defect, but by due care would have discovered it. *Held*, that the plaintiff may not recover. *Bates v. Batey & Co.*, 108 Law T. Rep. 1036.

Upon general tort principles a manufacturer should be held liable to others besides the immediate purchaser when with due care he could have discovered the defect. See *Heaven v. Pender*, 11 Q. B. D. 503, 510; 19 HARV. L. REV. 372; 44 AM. L. REG. N. S. 292. But it has been established otherwise. *Longmeid v. Holliday*, 6 Exch. 761; *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109. An exception is made when the chattel is imminently dangerous to human life. *Thomas v. Winchester*, 6 N. Y. 397. For other chattels the defendant is usually held when he had actual knowledge of the defect but not otherwise. *Woodward v. Miller*, 119 Ga. 618, 46 S. E. 847; *Heindirk v. Louisville Elevator Co.*, 122 Ky. 675, 92 S. W. 608. But an action against the original vendor is allowed in the case of foods. *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154; *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314. Thus where the plaintiff swallowed glass contained in a soda bottle the defendant was held though ignorant of its presence. *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S. E. 152. But the principal case does not fall within this class of cases, because the injury was not from the consumption of the article as food. On similar facts the same decision was reached in *O'Neil v. James*, 138 Mich. 567, 101 N. W. 828. A recent English case showed a tendency to adopt a more liberal rule, allowing recovery to one other than a contracting party when the defect was unknown. *White v. Stedman*, 29 T. L. R. 563. But the principal case adheres to the old rule of requiring actual notice.

**TRADE MARK AND TRADE NAMES. — INJUNCTION AGAINST WORDS ALREADY USED BY RIVALS — IS FRAUD NECESSARY?** — The plaintiff having been in business seventeen years under the name of "Los Angeles Van, Truck and Storage Co." seeks an injunction against the use of the name "Los Angeles Van and Storage Co." by a newly formed corporation, alleging that the similarity in the names is calculated to cause and will cause the public to deal with the defendant believing it to be the plaintiff. *Held*, that the injunction will not be granted. *Dunston v. Los Angeles Van and Storage Co.*, 131 Pac. 115 (Cal.).

The court in the principal case argues that since the plaintiff's name is too descriptive for registration, he must prove intentional fraud. In considering the case from this point of view, however, it can be argued that since deception of the public and passing off of the defendant's goods as the plaintiff's are the natural and probable consequences of the defendant's choice of name, he should be responsible. *Forster Manuf. Co. v. Cutter-Tower Co.*, 211 Mass. 219, 97 N. E. 74. It is not, however, necessary to follow this course of reasoning. Business reputation and good will have long been recognized by equity as property rights. See 26 HARV. L. REV. 442. Once it is proved that the public is mistaking the defendant's wares for the plaintiff's, this property right of the plaintiff's is being trespassed on, and equity should give relief. *North Cheshire & Manchester Brewery Co. v. Manchester Brewery Co.*, [1890] A. C. 83. The court also argues that defendant's advertisements are literally true, since defendant is a Los Angeles van and truck company, and that equity will not enjoin telling the truth. Historically the fact that defendant was telling an untruth in the sense of misdescribing himself or his business aided in the gradual extension of equity jurisdiction. Now, however, this jurisdiction has been definitely extended to cover business reputation, so the truth or falsity of defendant's advertisements taken by themselves is not material. The only fraud that is essential is the fraud on the plaintiff in leading the public to mistake the defendant's wares for those of the plaintiff.

**TRADE MARKS AND TRADE NAMES — NATURE OF RIGHT.** — The plaintiff circulated throughout the city of St. Louis a blind advertisement consisting of nothing but the word "Stopurkicken," intending to follow this with an advertisement of his laundry. The defendant, however, anticipated him by appropriating the scheme to the advertisement of its envelopes. The plaintiff now sues for damages. *Held*, that he cannot recover. *Westminster Laundry Co. v. Hesse Envelope Co.*, 156 S. W. 767 (Mo., St. Louis Ct. App.).

The principal case is clearly right in so far as it refuses to protect the phrase "Stopurkicken" as a trade name, because the right in a trade symbol or name cannot exist in the abstract, but arises solely from its relation to the business for which it stands. *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46; *Cigar-Makers' Protective Union v. Conkheim*, 40 Minn. 243, 41 N. W. 943. Nor can the plaintiff claim technically an injury to his good-will, because good-will is usually interpreted to mean the partiality of the public for a particular commodity or individual, and here the advertiser was unknown. See 16 HARV. L. REV. 135. But the mere lack of a familiar classification does not excuse the court for denying recovery. True, the interest to be safeguarded is intangible, but so is good-will. The plaintiff here has at heavy cost created a thing of undoubted value in the business world, and his loss is plainly demonstrable, much more so for example than damage to a man's reputation. It is novel situations like these that challenge the power of our law to expand, and the failure to do this in the principal case has permitted a defendant to escape liability though he has without justification inflicted serious practical loss.



TROVER AND CONVERSION — WHAT CONSTITUTES CONVERSION — FACTOR'S LIABILITY FOR SALE AUTHORIZED BY THE APPARENT OWNER. — The defendant, a factor, received cotton from a customer in regular course. It belonged, in fact, to the plaintiff. The defendant, in ignorance of the plaintiff's title, sold the goods and paid the proceeds to the customer. *Held*, that the defendant had not converted the cotton. *Ferguson Co. v. Ball*, 159 S. W. 221 (Tenn.).

The principal case is contrary to the well-settled rule that when a defendant knowingly consummates the sale of a plaintiff's property, though in good faith and in ignorance of the plaintiff's title, he is liable for converting it. *Consolidated Gas Co. v. Curtis* [1892], 1 Q. B. 495; *Flannery v. Harley*, 43 S. E. 765. See 21 HARV. L. REV. 408. Tennessee, however, is committed to the view expressed in the principal case. *Roach v. Turk*, 9 Heisk. (Tenn.) 708. Kentucky has also taken this position, claiming that the burden of examining the titles of all produce shipped to commission merchants for sale would drive them out of business. *Abernathy v. Wheeler*, 13 Ky. L. Rep. 730. A pronounced tendency to break away from the technical rule of conversion in the interests of commerce is evident in other cases. A bailee who redelivers unlawfully deposited property to the bailor, the apparent owner, is clearly not liable to the real owner. *Union Credit Bank v. Mersey Docks & Harlow Board* [1899], 2 Q. B. 205. A common carrier who receives goods from the apparent owner and innocently delivers them in pursuance of the bailment is not liable in trover. *Nanson v. Jacob*, 93 Mo. 331, 6 S. W. 246. A carrier indeed stands in need of protection because he must take all goods rightfully delivered to him. But since the necessities of business force commission merchants to rely on appearances they are in fact as greatly in need of protection as are boilers and common carriers.

WATERS AND WATERCOURSES — NATURAL LAKES AND PONDS — OWNERSHIP OF BED OF NAVIGABLE LAKE. — The state brought suit to quiet title to the bed of a lake, claiming that it was navigable in the technical sense. There were a number of sandbars and dead trees to obstruct travel. *Held*, that such a lake being navigable, title to the bed is in the state. *State v. West Tennessee Land Co.*, 158 S. W. 746 (Tenn.).

This case is commented upon in this issue of the REVIEW on p. 80.

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## BOOK REVIEWS.

PENAL PHILOSOPHY. By Gabriel Tarde. Translated from the fourth French edition. By Rapelje Howell. Boston: Little, Brown, and Company. 1912. pp. xxxii, 581.

This work deals, according to the statement of the author in his foreword, with three different matters: First, an attempt to reconcile moral responsibility with scientific determinism; second, an explanation of crime in conformity with the views of the author; third, an indication of needed legislative and penal reforms suggested by the views previously presented.

The attempt to reconcile scientific determinism with moral responsibility is based upon the necessity of finding some foundation for moral responsibility other than free will. In an increasing number of cases it is becoming recognized and admitted that the criminal could not have done other than he did. The defense is able, more and more strongly, to rely upon the alienist in its attempt to prove that fact. If that fact, then, is recognized as a defense, we face, according to the author, a very real social danger in that in an ever

increasing number of cases the doer of an act inimical to the interests of society must be given immunity. At the most he is to be treated merely as an unfortunate.

But if the conception of free will and of moral responsibility based upon it are disappearing before the progress of scientific determinism, what has scientific determinism to offer in its place as a justification for repressive measures. It is this: The malefactor is an enemy to society. As an enemy, though on the inside, means analogous to those used for the repression of an enemy on the outside should be used. In the case of such an enemy the only question asked is as to the utility of the means used. The responsibility of the enemy is not a factor to be considered. The same is true in the case of the malefactor within society. The question to be solved is the finding of the most effective means of repression. The personal characteristics of the malefactor are important only in so far as they help to solve this question.

But the elimination, for the purpose of determining the liability of the malefactor, of the question of responsibility which is thus accomplished is contrary to the actual belief of practically every individual in society. Is it possible to reconcile that belief with scientific determinism? Tarde believes that it is, and that the reconciliation may be accomplished by an investigation of what men have always meant when they have declared one of themselves responsible, criminally or civilly.

Following out this thought, he makes responsibility depend upon the existence of two conditions: (1) the personal identity of the supposed criminal, and (2) his social similarity to the members of that society which claims the right to condemn him. By personal identity is meant psychological identity, a continuity of mental states showing no marked variation. By social similarity is meant a similarity in beliefs, feelings, tastes, and inclinations.

Whatever one may say as to theoretical soundness of such a view, there is no doubt that it offers a test of liability more in accord with existing institutions than the utilitarian test of the positivists.

Tarde, in his explanation of crime, accepts Ferri's theory of factors by which crime is declared to be the result of three factors classified as follows: anthropological, physical, and social. It is perhaps natural, in view of his requirement of social similarity as a test of responsibility that he should emphasize the social factors. Many who would be classed by the positivists as criminals would not be so classed by Tarde because of lack of psychological identity or social similarity. Among the social factors he finds the chief, indeed almost the sole, cause of crime in the strong tendency to imitation found in every individual.

This does not prevent the criminal from having his distinguishing characteristics, however. Tarde says, "Perhaps one is born vicious, but it is certain that he becomes a criminal." In the becoming he necessarily develops certain traits as one does in becoming anything else. Hence the criminal has a professional type distinguished by the marks of his profession.

The chief reforms advocated are the abolition of the jury and the alteration of the death penalty. The whole institution of the jury is declared to be defective in its foundations. Its results are declared to be uniformly bad, and it is said to lack even the doubtful merit of reflecting public opinion. The rational basis of penal law is said to lie in public opinion. This statement is in accord with the foundation of the theory of responsibility before mentioned, but seems hardly in accord with the statement just referred to. With respect to the death penalty, though its legitimacy is maintained and the arguments against it declared weak, it is suggested that its effectiveness is destroyed by the prejudice against it which prevents it from being put into actual operation. Hence it ought either to be abolished, or the form of administering it ought to be changed so as to in some measure overcome the prejudice against its use.



The book is a splendid contribution to the subject it discusses. Sometimes the wealth of learning possessed by the author seems to lead him into fields the exploration of which adds but little to the discussion in hand and makes the book more difficult reading than it would otherwise be. The views advanced are founded upon a long experience as a magistrate, and are especially valuable to those who are engaged in the application of law as it is.

O. S. R.

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A COMPARATIVE STUDY OF THE LAW OF CORPORATIONS. By Arthur K. Kuhn. New York: Longmans, Green, and Company. 1912. pp. 173.

This little book is learned and interesting. After tracing the origin and development of the legal conception of a corporation in Ancient Times, in the Middle Ages, and in England, the author gives a summary of the laws of the principal countries of Continental Europe (excepting Austria and Russia) and of England and America, which relate to the organization and operation of corporations, considered with particular reference to the protection of creditors and shareholders. Within the limits of his space of course nothing more than a summary was possible, but in this summary the author has succeeded in giving a very clear presentation of the salient differences between (a) the law of Continental Europe and the Anglo-American law; (b) the laws of France and Germany and Italy and Spain and Switzerland; and (c) the laws of England and America.

The author prefers the German system — the thoroughness and *gelehrtheit* of the German naturally fascinates a scholarly mind — and seems to regard it as one to be applied generally. "What is required," he says, speaking of legislation and reform in England and America, "is an effective control over organization and administration; not a mere change in the association type" (p. 115). He considers that the German system, with its drastic penal laws, and with its provisions for publicity, and for a managing directorate, subject at all times to the control of the stockholders and the general supervision of the supervising council, affords the most effective guaranties for the protection of investor and creditor (p. 134). And, in accord with a widely current opinion of to-day, he assumes that "the overcapitalization of corporations has ever been one of the chief sources of evil resulting from the corporate form." As the author is considering the subject from the point of view of what is required for the protection of creditors and shareholders, this must mean that overcapitalization is an evil, so far as creditors and shareholders are concerned. But is this correct?

The author himself admits (p. 115) that "only the most ignorant will assume that the par value of a share of stock must necessarily be its real value." And is it not also true that only the most ignorant stockholder will so assume? The fact is that neither the creditor nor the *investing* stockholder ever measures the credit and responsibility of a corporation by its nominal capitalization, but solely by its assets and the character and ability of the men who are managing it. The creditor and the *investing* stockholder know that the capital stock, in so far as it exceeds the actual present assets of the corporation, represents merely an optimistic estimate as to its earning power. And looking at the matter broadly and beyond the interests of the creditor and investing stockholder of the particular corporation, must we not say that the evils of overcapitalization have been greatly overestimated, and that its advantages have been greatly underestimated or entirely disregarded? The panics of 1873 and 1893 did not result from the overcapitalization of corporations, nor were their evil effects accentuated by it. The Wall Street panic of 1884 affected

only a relatively small number of speculators, and made but a slight impression upon the general business and prosperity of the country. The panic of 1907 began with the disclosure of rottenness in our national banks, the most regulated and supervised of all our corporations. Its ravages were stayed by the action of the United States Steel Corporation, the most heavily overcapitalized of our corporations, and the recovery from the panic was quickened, when it was revealed that our industrial enterprises, including the overcapitalized, were intrinsically sound and honestly managed. Our great railway corporations, overspreading the great Western country and pouring wealth into the lap of the monopoly-hating bucolic, were built with the aid of "watered stock," and now that our statute law, in harmony with the Continental law, generally condemns "watered stock," the door of opportunity is closed for many an enterprising man of limited means.

The comparative study of law, which is now receiving increasing attention, will undoubtedly promote the improvement of legal systems and should be encouraged. But we should never lose sight of the fact that a law good for one country may not be good for another — and that a sound system of law must be broad-based upon the ideas and particular conditions of the nation which is governed by it.

While one may differ with Dr. Kuhn as to some of his conclusions, his treatise may be commended as a very useful introduction to this comparative study of law, so far as corporations are concerned.

G. F. C.

**THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES.** By Max Farrand. New Haven: Yale University Press. 1913. pp. xi, 281.

This book presents briefly and clearly the requisite information as to the federal convention which framed the Constitution. Both in choice of matter and in method of treatment the author has done his work well. From the large mass of available material — a mass already collected in his three volumes entitled *The Records of the Federal Convention* — he has selected the points which are essential; and by presenting these points in an appropriate order and interweaving with them indications of the views of the statesmen of the time, he has produced a narrative which, besides being accurate and useful, is easy to read and easy to remember. The reasons for calling the convention, the preliminary steps, the prominent features of the "Virginia Plan" and of the "New Jersey Plan," the compromises, the committee of detail — all these topics have adequate treatment. Besides, there is an interesting background of history and of biography, so that an important by-product of the book is knowledge of the problems and persons of that time now recognized as the critical period of American constitutional history. In proceeding systematically through the chief events of the convention the author sometimes places in a light which is new, or at least uncommonly clear, facts not always emphasized. Thus there is indication of the convention's knowledge that the federal courts would disregard unconstitutional acts of Congress (pp. 120, 121, 157), and there is mention of the use which the framers of the Constitution made of ideas and phraseology found in the Articles of Confederation and in the state constitutions (pp. 127-129, 139). An appendix contains the Articles of Confederation, the Virginia Plan, the New Jersey Plan, and the Constitution, thus enabling the reader to verify many of the author's statements and to make further comparison of the documents. Finally, the author has added to the interest of his volume by expressing now and then some personal opinions of his own which may excite opposition — for example, views as to the relative influence of Washington, Franklin, Madison, Hamilton, and Charles Pinckney,



and a brief rejection of claims recently made in behalf of Pelatiah Webster (p. 53).

In short, this is a book worth reading.

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THE LAW OF COMMERCIAL EXCHANGES. By Chester Arthur Legg. New York: Baker, Voorhis, and Company. 1913. pp. xxxiv, 381.

This seems to be an excellent handbook for all who have to do with the Commercial Exchanges. It should prove quite as useful to the members themselves as for those to whom they may go for advice. The author has been for some time the counsel for the Chicago Board of Trade, and knows, therefore, the matters whereof he speaks. He has accomplished an eminently practical work in bringing out the relations which the law enforces between the members of these commercial bodies. Such a chapter as that on the Administrative Power over Members is one which cannot but be valuable to those subject to its rules. And the chapter on the Review of the Decisions of Exchanges by the courts shows that the law of the land will never permit outrageous injustice to be done however far a member may have committed himself. An interesting question considered in the latter part of the book is whether in the furnishing of quotations to the public the exchanges are performing a service in which the public has such an interest as to make the distributing of them subject to regulation by the public. The author seems to feel that not merely are the quotations property, which is undoubtedly the case, but that there is no sufficient reason to impress upon this business of communicating, a duty to the public affected. The decisions are, to be sure, conflicting, but that news agencies are public in character seems to be the way in which the law will eventually work out. This is especially true where a system is established for distributing the quotations through tickers. And in general the commercial exchanges should appreciate that if they are to be left with such control of the situation as they have attained, it can only be on the terms of submitting themselves to regulation to the extent that it is felt that the situation requires.

B. W.

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THE FIXED LAW OF PATENTS AS ESTABLISHED BY THE SUPREME COURT OF THE UNITED STATES IN THE NINE CIRCUIT COURTS OF APPEALS. By William Macomber. Second Edition. Little, Brown, and Company. 1913. pp. clxix, 1044.

The second edition of this book requires but brief comment in addition to what was said in regard to the first edition in Volume 23 HARVARD LAW REVIEW, No. 3, January, 1910.

Mr. Macomber's exposition of the fixed law of patents under the head of "Brief Survey" is the only part of the text of the first edition that appears to have been revised. The rest of the text is simply reprinted from the plates of the first edition. The cases since decided form the subject of an appendix beginning at page 915, and are included in the table of cases extracted and in the general index.

We hope that when Mr. Macomber publishes a third edition of his work he will not make a second appendix, but will incorporate all the decisions in one homogeneous whole, and make such helpful changes as putting in quotation marks the words of the courts, so that they may readily be distinguished from his own remarks.

J. L. S.

- JUSTICE AND THE MODERN LAW. By Everett V. Abbot. Boston and New York: Houghton, Mifflin Company. 1913. pp. xiv, 299.
- THE THEORY OF SOCIAL REVOLUTIONS. By Brooks Adams. New York: The Macmillan Company. 1913. pp. vii, 240.
- CRIME AND ITS REPRESSION. By Gustav Aschaffenburg. Translated by Adalbert Albrecht. Boston: Little, Brown, and Company. 1913. pp. xxviii, 331.
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## THE EXERCISE OF JURISDICTION *IN REM* TO COMPEL PAYMENT OF A DEBT.

IN a previous article<sup>1</sup> the jurisdiction of courts over foreign persons has been examined. It remains to consider the power of a court to compel an absent defendant, through jurisdiction over property belonging to him, to discharge his obligations.

Jurisdiction *in rem* depends solely on the physical control of the *res* by the sovereign exercising jurisdiction.<sup>2</sup> A few exceptions to this general statement are to be sure established; thus where property is carried into a foreign territory without the coöperation or consent of the owner jurisdiction cannot be exercised.<sup>3</sup> These exceptions have no bearing on the general discussion and will be no further instanced or considered. The typical example of jurisdiction *in rem* is the jurisdiction of the Court of Admiralty over any vessel within the territorial waters of its sovereign.<sup>4</sup> But jurisdiction *in rem* is by no means confined to admiralty jurisdiction. Although in admiralty the subject of jurisdiction is personified and made a defendant, this is not necessary to the exercise of jurisdiction; a sovereign may subject a thing to the jurisdiction

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<sup>1</sup> 26 HARV. L. REV. 193, 283.

<sup>2</sup> The *Belgenland*, 114 U. S. 355 (1885); *Castrique v. Imrie*, L. R. 4 H. L. 414 (1870); Story, *Conf. Laws*, § 592.

<sup>3</sup> See e. g. Cockburn, C. J., in the course of the argument in *Cammell v. Sewell*, 5 H. & N. 728 (1860); *Edgerly v. Bush*, 81 N. Y. 199 (1880).

<sup>4</sup> The *Belgenland*, 114 U. S. 355 (1885); *The Bee*, 1 Ware 336, 3 Fed. Cas. No. 1,219 (1836).



of his courts by other forms of process.<sup>5</sup> For instance, while a court of equity has, generally speaking, no jurisdiction *in rem* without the aid of statute, it may be given by statute jurisdiction over rights in land; and in that case it may exercise its jurisdiction to determine the title of all land within the territory,<sup>6</sup> or otherwise to deal with the land,<sup>7</sup> although the claimants are abroad. And this power is not confined to jurisdiction over land. The courts of a sovereign may also be empowered to determine the title to chattels,<sup>8</sup> or to foreclose liens or settle accounts,<sup>9</sup> although the owner of the chattel or the trustee of the estate is abroad. The jurisdiction *in rem* depends upon control of the thing at the time litigation is begun. If the jurisdiction is once exercised over a thing within the territory the subsequent removal of the thing out of the territory pending the litigation does not oust the court of jurisdiction,<sup>10</sup> although if anything else is substituted for the thing, as for instance if the thing, whether movable or immovable, is taken out of the court upon a bond being substituted in its place, the jurisdiction over the thing ceases and cannot afterwards be exercised unless it is again brought within the power of the court on subsequent proceedings.<sup>11</sup>

<sup>5</sup> Holmes, C. J., in *Tyler v. Court of Registration*, 175 Mass. 71, 76, 55 N. E. 812 (1900).

<sup>6</sup> *Arndt v. Griggs*, 134 U. S. 316 (1890); *Ormsby v. Ottman*, 85 Fed. 492, 29 C. C. A. 295 (1898); *McLaughlin v. McCrory*, 55 Ark. 442, 18 S. W. 762 (1892); *Loaiza v. Superior Court*, 85 Cal. 11, 24 Pac. 707 (1890); *Hollenback v. Poston*, 34 Ind. App. 481, 73 N. E. 162 (1905); *Felch v. Hooper*, 119 Mass. 52 (1875); *Short v. Caldwell*, 155 Mass. 57, 28 N. E. 1124 (1891); *Kidd v. N. H. Traction Co.*, 72 N. H. 273, 56 Atl. 465 (1903); *Hardy v. Beaty*, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80 (1892).

<sup>7</sup> Reconveyance: *La Trobe v. Hayward*, 13 Fla. 190 (1869). Partition: *Williams v. Williams*, 221 Ill. 541, 77 N. E. 928 (1906). Injunction against transfer: *Tomson v. Tomson*, 31 N. J. Eq. 464 (1879). Foreclosure: *Cook v. Weigley*, 68 N. J. Eq. 480, 59 Atl. 1029 (1905). Specific performance: *Clem v. Gwen*, 106 Va. 145, 55 S. E. 567 (1907). Establishment of trust: *Porter L. & W. Co. v. Baskin*, 43 Fed. 323 (1890); *Pennington v. Smith*, 69 Fed. 188 (1895); *Reeves v. Pierce*, 64 Kan. 502, 67 Pac. 1108 (1902).

<sup>8</sup> *Wilson v. Graham*, 4 Wash. C. C. 53, 30 Fed. Cas. No. 17, 804 (1821) (box); *Loaiza v. Superior Court*, 85 Cal. 11, 24 Pac. 707 (money) (1890); *Gassert v. Strong*, 38 Mont. 18, 98 Pac. 497 (trust in stock) (1908); *Tomson v. Tomson*, 31 N. J. Eq. 464 (money) (1879); *Ward v. Arredondo*, Hopk. 213, 14 Am. Dec. 543 (deed) (1824); *Monroe v. Douglas*, 4 Sandf. Ch. 126 (estate) (1846).

<sup>9</sup> *Oswald v. Kampmann*, 28 Fed. 36 (1886).

<sup>10</sup> *The Rio Grande*, 23 Wall. (U. S.) 458, 23 L. ed. 158 (1874); *Wilson v. Graham*, 4 Wash. C. C. 53, 30 Fed. Cas. No. 17, 804 (1821).

<sup>11</sup> *Shields v. Coleman*, 157 U. S. 168 (1895).

This power over things has always been exercised by courts for the enforcement of the obligations of absent owners. It is so palpably unjust that a debtor should be able, by putting his property outside the jurisdiction of the courts of his own domicile, to escape the compulsion of courts forcing him to discharge his obligation, that the court within whose jurisdiction his property has been thus placed by him should use its power over the property to give justice to the creditor. By proper action therefore the creditor may obtain payment of his debt out of the debtor's property, although he is unable to obtain personal service upon the debtor. The jurisdiction of the court to grant such remedy is obviously its jurisdiction over the *res* and nothing else;<sup>12</sup> but in that it is not dealing with the *res* because of any right asserted in the thing itself, this exercise of jurisdiction differs from the ordinary exercise of jurisdiction *in rem*, in which some existing claim upon the thing itself is asserted. To mark this distinction the phrase "jurisdiction *quasi in rem*" may be applied to this sort of jurisdiction.<sup>13</sup> It is in all essentials of jurisdiction the same as jurisdiction strictly *in rem*, so far as the property is concerned; but no power can be assumed over the person because of the power over his property, and no personal judgment can be rendered against the person for any excess of the debt over and above the amount realized from sale of the property seized.<sup>14</sup>

Since the jurisdiction is in reality a jurisdiction over the thing and since therefore no judgment against the person that he owes a debt may effectually be granted the proceeding must in some way be brought against the thing and not against the person. In other words, to obtain jurisdiction the process must be directed against the thing and the claim of the complaining party must in its terms be directed against the thing and not be a complaint against the debtor for failing to pay his debt.<sup>15</sup> This may be accomplished

<sup>12</sup> A court cannot seize and apply an equitable interest in land outside its jurisdiction. *Butterfield v. Ogborn*, 1 Disn. (Ohio) 550 (1857). A controversy as to the ownership of promissory notes in Tennessee, secured by mortgage of land in Mississippi, cannot be determined in Mississippi in the absence of the holder. *Cocke v. Brewer*, 68 Miss. 775, 9 So. 823 (1891).

<sup>13</sup> *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372 (1886).

<sup>14</sup> *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372 (1886); *McVicker v. Beedy*, 31 Me. 314 (1850); *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705 (1887); *Arndt v. Arndt*, 15 Ohio 33 (1846); *Jones v. Spencer*, 15 Wis. 583 (1862).

<sup>15</sup> *Pennoyer v. Neff*, 95 U. S. 714 (1877) (no attachment); *Starkey v. Lunz*, 57 Or.



by a bill in which the court is requested to seize the property and apply it to the payment of the alleged debt. But the commonest form of proceeding is by some form of attachment of the property in which the request of the complainant for the attachment and sale of the property is the real gist of the complaint.

The attachment may either be the ordinary attachment of the property or the process which is called foreign attachment, trustee process or garnishment. This latter form of process will be separately considered later.

The attachment of tangible property offers no difficulty. Any property may, of course, be attached if the sovereign within whose jurisdiction it lies so wills. The fact that the property was not attachable in the place from which it came or in the place where the debt was contracted or in the place where the debtor lives is quite immaterial; thus the only exemption law which can prevail within the jurisdiction is the exemption law of that territory.<sup>16</sup> When, however, the question arises as to the power to attach commercial securities we meet with a somewhat embarrassing question. How far is a mercantile security a thing within the jurisdiction, or how far is it merely the evidence of an intangible chose in action? In ancient times the court undoubtedly regarded such securities as not in themselves chattels but as mere evidences of the existence of a chose in action. With the lapse of time, however, mercantile practice became otherwise. A bill of exchange, a certificate of stock, or even an insurance policy came to be a thing having value in itself and capable of being dealt with where it was. It becomes a question of much interest in the law whether this mercantile practice has resulted or should result in a change in the attitude of the court with respect to such securities. It is not intended in this place to examine this question in detail. One class of securities, however, presents consideration which may be of particular interest. The certificate of title to stock in a cor-

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147, 110 Pac. 702 (1910) (attachment void); *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, (1870).

<sup>16</sup> *Chicago, R. I. & P. Ry. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144 (1899); *Boykin v. Edwards*, 21 Ala. 261 (1852); *Mineral Point R. R. v. Barron*, 83 Ill. 365 (1876); *Broadstreet v. Clark*, 65 Ia. 670, 22 N. W. 919 (1885); *Burlington & M. R. R. v. Thompson*, 31 Kan. 180, 1 Pac. 622 (1884); *Morgan v. Neville*, 74 Pa. 52 (1873). But see *Missouri Pac. Ry. v. Sharitt*, 43 Kan. 375, 23 Pac. 430 (1890); *Drake v. Lake S. & M. S. Ry.*, 69 Mich. 168, 179, 37 N. W. 70 (1888).

poration is commonly dealt with in the market as a commercial document of value and in an English case it has been held that it is so far a self operating document of value as to be assets at its situs.<sup>17</sup> The courts, however, almost unanimously hold that the presence of a certificate of stock within the jurisdiction gives no power to take the right evidenced by the certificate;<sup>18</sup> existing only on the books of the corporation, it can be attached only in that place where the corporation books legally exist, that is, at the domicile of the corporation.<sup>19</sup>

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The question of foreign attachment or garnishment requires more consideration, and it is full of theoretical difficulties. Garnishment is a form of attachment in which the property attached is not taken directly by the sheriff but is reached in the hands of a third person holding it. He is warned (garni) to hold the property subject to the order of the court. The ordinary process of garnishment involves two actions: first an action of debt or contract is brought against a defendant to recover damages in the ordinary way; then it is alleged that he has property in the hands of a third person which cannot be come at in the ordinary way, and the third person is therefore called upon to come in with the property and hold it to abide the result of the first suit. The third person is brought into the action, but only as a stake holder. He is not charged as a wrongdoer, even though the suit involves the proof against him of a debt due to the principal defendant.

The process of foreign attachment or garnishment is based upon

<sup>17</sup> *Stern v. Queen*, [1896] 1 Q. B. 211.

<sup>18</sup> *Pinney v. Nevills*, 86 Fed. 97 (1898); *Smith v. Downey*, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 568 (1893); *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 20 S. W. 690 (1892); *Plimpton v. Bigelow*, 93 N. Y. 592 (corporation doing business in state; certificate does not appear to have been in state) (1883); *Ireland v. Globe M. & R. Co.*, 19 R. I. 180, 32 Atl. 921 (1895) (same facts).

In *Simpson v. Jersey City Contr. Co.*, 165 N. Y. 193, 58 N. E. 896 (1900), it was held that the certificate of stock in a foreign corporation could be attached, the certificate itself being in the state. Gray, J., said: "The truth is that it did have property here, in the common acceptance of the term, as well as in the eye of the law. Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market, and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand, and they are [by statute] the subject of larceny."

<sup>19</sup> *Wait v. Kern River M. M. & D. Co.*, 157 Cal. 16, 106 Pac. 98 (1909); *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20 (1903); *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 2 S. W. 202 (1886).



the custom of London of Foreign Attachment. The earliest full account of this custom that has been found is in an old book called "The City Law" published in 1647. As there described the process is as follows:<sup>20</sup> — "When a plaint of debt is brought before any of the said sheriffes testimony is given by the officer that the defendant hath not sufficient within the said city, and it is alleadged, that the defendant hath goods and chattels, or debts in other hands, or in others' keeping within the said city, and the plaintiffe prayeth that such goods and chattels may bee arrested and an extent may be made of the debts, then at the suit and suggestion of such plaintiffe such goods and chattels shall be arrested where-soever they be found within the city, and an extent shall bee made of the debts, at the perill of the plaintiffe." The custom is stated in much the same terms in the Privilegia Londini.<sup>21</sup> In that work it is added "Note, the plaintiff ought to surmise that the other man who is indebted to the defendant is within the city; 22 Ed. 4, 30, per Starkey, Recorder of London, the custom so certified."

The custom of London became the custom of several colonies as a part of their common law. In New England, it takes the name of trustee process; in Pennsylvania, where the introduction of the custom was by statute, it is called foreign attachment. In most of the states of this country the process is called garnishment. But whether the process be permissible under the common law or depends upon the statute, it is in all cases really based upon the custom of London.

The jurisdiction for garnishment is obviously based upon the possession by the garnishee of property belonging to the defendant, which can be reached by the court because it is situated within the territory of the court. The proceeding to collect the principal claim is not itself *in rem*; and if the defendant in this proceeding is absent the court has no power to determine the principal claim; jurisdiction to apply the property to the payment of the alleged claim must therefore depend upon the actual situs of the property within the control of the court, or upon some power in the court over the property derived from some other circumstance.

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<sup>20</sup> Page 42.

<sup>21</sup> Page 253.

In the case of a tangible chattel there is no difficulty whatever and no difference of opinion in the cases. The possessor of a chattel, in a suit against the owner of the chattel, cannot be garnished outside the jurisdiction in which he holds the chattel. Thus where a carrier is engaged in transporting goods he can be garnished in a suit against the owner in any state through which the goods pass, but only while the goods happen to be in transit through the state. He is not subject to garnishment either before the goods come into the state or after they have passed through it and gone into another.<sup>22</sup>

In the case of a chose in action evidenced by a document the case appears to be the same. If no attachment could be issued against the document itself no garnishment proceeding will lie against the possessor of the document. On this ground it has been held that a pledgee or other bailee who holds a certificate of stock within a state cannot be garnished in that state in a suit against the absent owner,<sup>23</sup> nor can a foreign corporation be garnished in a state in a suit against a foreign stockholder,<sup>24</sup> the court having no control over the *res*; since it has no power to attach, it has for the same reason no power to garnish.

When these considerations are applied to the garnishment of a debt great difficulty is at once felt. In its nature, a mere chose in action has no situs any where. This is not merely because it is intangible, for some intangible things, as has been seen, have a sort of location in connection with a tangible thing. Thus a share of stock has a sort of situs where the stock book is kept or rather where the corporation is domiciled; and a judgment has in the same sense a situs in the court which rendered it; the sovereign of the place having complete and sole power over it. Similarly the

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<sup>22</sup> *Western R. R. v. Thornton*, 60 Ga. 300 (1878); *Montrose Pickle Co. v. Dodson*, 76 Ia. 172, 40 N. W. 705 (1888); *Wheat v. Platte C. & F. D. R. R.*, 4 Kan. 370 (1868); *Sutherland v. Second Nat. Bank*, 78 Ky. 250 (1880); *Clark v. Brewer*, 6 Gray, 320 (1856); *Pennsylvania R. R. v. Pennock*, 51 Pa. 244 (1865); *Bates v. Chicago, M. & S. P. Ry. Co.*, 60 Wis. 296, 19 N. W. 72 (1884).

<sup>23</sup> *Winslow v. Fletcher*, 53 Conn. 390, 4 Atl. 250 (1886); *Christmas v. Biddle*, 13 Pa. 223 (1850). The contrary opinion expressed in *National Bank v. Lake Shore & M. S. R. R.*, 21 Ohio St. 221 (1871), and *Puget Sound Nat. Bank v. Mather*, 60 Minn. 362, 62 N. W. 396 (1895), is due to the expressed opinion of the court that shares of stock are taxable where the certificate is found, and not to any idea that an interest could be reached by garnishment that could not be reached by attachment.

<sup>24</sup> *Ashley v. Quintard*, 90 Fed. 84 (1898).



intangible thing called good will of a business is situated where the business is carried on. But an ordinary chose in action has no such situs. The only attempts to ascribe situs to a debt have been to fix it at the domicil of the creditor or of the debtor. It has been urged in many cases, especially in taxation cases, that the situs of the debt is at the domicil of the creditor, since it is a valuable thing in his hands. The answer to this is that it is not a thing at all in the hands of the creditor, but merely the legal power of getting a thing from the debtor. Its value to the creditor simply lies in the power it gives the creditor over the debtor. In so much as the creditor is richer by the possession of it, the debtor is poorer. It is, therefore, not a real thing, adding, like good will, to the wealth of the world, but merely a relation between the debtor and creditor, which is advantageous to one and detrimental to the other. The explanation of the power of taxing it at the domicil of the creditor is that as it adds to the creditor's wealth the power that may tax the creditor personally may exact the tax from him based on the ability which this power over the debtor gives him to pay the tax.

More specious efforts have been made to locate the debt with the debtor.<sup>25</sup> In favor of this location is the view the law originally took of the debt, that is, that it is a thing in the possession of the debtor and belonging to the creditor. The original nature of the action of debt as a real action, to recover from the debtor a thing held by him for the creditor, illustrates this conception of a debt.<sup>26</sup> It is to be noted, of course, that even if we hold this conception the debtor has no *specific* thing of the creditor in his possession which could be reached by attachment and therefore this sort of situs ought not to be regarded as sufficient for garnishment. But this conception of the nature of a debt has long since disappeared from the law, and the debtor is now regarded merely as a party to a contract for the payment of money, i. e., as one party to a chose in action.

Without basing any argument upon the original nature of the debt, modern courts have nevertheless suggested a situs of the debt where the debtor is for several purposes; of which the commonest is the administration of estates. A debt is alleged to

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<sup>25</sup> Minor, Conflict of Laws, § 121.

<sup>26</sup> Ames, Lectures on Legal History, 78.

be assets at the domicile of the debtor for the purpose of founding administration. If that were really the conception of the law it would follow that only in that place could the debtor be forced to pay his debt to the estate, and that the administrator in that place alone could make an assignment of the claim to collect it. The fact is, however, quite opposite. Any administrator may make a claim for payment upon a debtor who is only temporarily within his jurisdiction and may receive or even compel payment of the debt. All that is meant, then, by saying that the debt is assets where the debtor is domiciled is that administration may be taken out there on account of the debt, though there are no other assets. This is true, but it is for the very practical reason that there alone can an administrator be sure of reducing the claim to possession by a suit. In every other place the power to sue the debtor is dependent upon the accident of his being found within the state; at his domicile he may be sued whether he can be found there or not. The administrator at the domicile of the debtor is therefore the only administrator who can be *sure* of having jurisdiction to sue, and for this reason it is permissible to appoint an administrator there. An attempt has been made to extend this doctrine to the case of garnishment and to say that the debt is situated for the purpose of garnishment at the domicile of the debtor and only there. This is open to the same objection urged against the similar doctrine of the case of administration. The debtor may be sued in any place where he can be served with process. If the debt were situated at the domicile of the debtor it is quite clear that it could be discharged by proceedings in bankruptcy or insolvency. It has, however, been conclusively determined by the Supreme Court of the United States that an insolvent court at the domicile of the debtor cannot discharge him<sup>27</sup>; and this is settled law.<sup>28</sup> If he cannot be discharged in an insolvency or bankruptcy proceeding it would seem all the more that he cannot be discharged in garnishment.

The true doctrine would seem to be that a debt has in fact no situs anywhere; not merely because it is intangible but because as a mere forced relation between the parties it has no real existence anywhere. Like other such relations it may, of course, be controlled by the law, and by the courts as instruments of the law;

<sup>27</sup> *Ogden v. Saunders*, 12 Wheat. (U. S.) 213 (1827).

<sup>28</sup> *Felch v. Bugbee*, 48 Me. 9 (1859).



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but the control must be obtained by making use of the relation. In order to control the relation the court must have the power to control both parties to it. Any court which has both debtor and creditor may compel a release from the creditor and an assignment of the action of the creditor. In other words if a debt is to be legally assigned or discharged it requires the action of both parties and especially the creditor, and the court which has to apply such a process must do so through its control over both parties.

The history of the law of garnishment, and the particular form which the action has taken — that is, the double action: first against the debtor, and then against the debtor's debtor, — have led the courts, it is submitted, into error as to the jurisdiction. It is in truth first an inquiry into a fact, the indebtedness, followed by the real judicial action, the seizure and application of the credit by suit against the garnishee. The courts have without sufficiently careful consideration assumed it to be two successive actions *in personam* against two parties.

Our process of garnishment was, as has been seen, derived from the custom of London<sup>29</sup> as to foreign attachment. The courts of London had jurisdiction over citizens only; and it could proceed upon such claims only as arose entirely within the city.<sup>30</sup> This, in the case of contracts, would mean such contracts as were performable in London, for instance, a foreign bill drawn on a London merchant.<sup>31</sup> Garnishment was subject to the same principles; and therefore no debt could be reached by foreign attachment unless it was due in London, and only a resident of London could be summoned as a garnishee.<sup>32</sup> When the custom was brought to this country, the question which was first raised was whether a debt due to a foreigner by another foreigner could be garnished in an action against the absent creditor; and it was rightly held that the custom of London allowed no such suit, and

<sup>29</sup> Other English cities had similar customs, e. g. Exeter. There is, however, no evidence that any other custom except that of London was brought to this country; but what is here said of the custom of London would equally apply to any local custom.

<sup>30</sup> *Mayor of London v. Cox*, L. R. 2 H. L. 239 (1867).

<sup>31</sup> *Shand v. Du Buisson*, L. R. 18 Eq. 283 (1874).

<sup>32</sup> "It is quite obvious, therefore, that the custom of foreign attachment cannot in reason apply to debts or garnishees out of the jurisdiction; and it is so settled by authority." Willes, J., in *Mayor of London v. Cox*, L. R. 2 H. L. 239, 266.

that the proceedings would not lie in such a case in this country.<sup>33</sup> Unfortunately the question whether the debt which formed the subject of garnishment was due within the state was not raised in the earlier cases; and this requirement of jurisdiction dropped out of judicial memory. Thus, we find that while careful courts forbade the exercise of garnishment where the garnishee was not resident within the jurisdiction, whether the garnishee was an individual foreigner<sup>34</sup> or a foreign corporation,<sup>35</sup> garnishment was allowed at the residence of the garnishee without inquiry as to where the garnished debt was payable,<sup>36</sup> and even in cases where the court noticed that the debt was a foreign one.<sup>37</sup> In a few cases the court, in deciding that a foreigner could not be reached by gar-

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<sup>33</sup> *Tingley v. Bateman*, 10 Mass. 343 (where the court pointed out that garnishment seemed to be confined to debts arising within the jurisdiction); *Redwood v. Consequa*, 2 Bro. (Pa.) 62 (1811); *Cronin v. Foster*, 13 R. I. 196 (1881).

<sup>34</sup> *Everett v. Connecticut Mut. L. Ins. Co.*, 4 Colo. App. 509, 36 Pac. 616 (1894); *Nye v. Liscombe*, 21 Pick. 263 (1838); *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630 (1851); *Smith v. Eaton*, 36 Me. 298, 58 Am. Dec. 746 (1853); *McKinney v. Mills*, 80 Minn. 478, 81 Am. St. Rep. 278, 83 N. W. 452 (1900); *Sawyer v. Thompson*, 24 N. H. 510 (1852); *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183 (1864); *Straus v. Chicago Glycerine Co.*, 46 Hun 216 (affirmed in 108 N. Y. 654, 15 N. E. 444) (1888), *Carr v. Corcoran*, 44 App. Div. 97, 60 N. Y. Supp. 763 (1899); *Baxter v. Vincent*, 6 Vt. 614 (1834).

<sup>35</sup> *Atchison T. & S. F. R. Co. v. Maggard*, 6 Colo. App. 85, 39 Pac. 985 (1895); *Green v. Farmers' & C. Bank*, 25 Conn. 452 (1857); *National Bank v. Furtick*, 2 Marv. (Del.) 35, 44 L. R. A. 115, 69 Am. St. Rep. 99, 42 Atl. 479 (1897); *Northwestern Life & Sav. Co. v. Gippe*, 92 Minn. 36, 99 N. W. 364 (1904); *Swedish-American Nat. Bank v. Bleecker*, 72 Minn. 383, 42 L. R. A. 283, 71 Am. St. Rep. 492, 75 N. W. 740 (1898); *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 20 L. R. A. 118, 34 Am. St. Rep. 448, 33 N. E. 938 (1893); *National Broadway Bank v. Sampson*, 179 N. Y. 213, 71 N. E. 766 (1904); *Wood v. Furtick*, 17 Misc. 561, 40 N. Y. Supp. 687 (1896); *Allen v. United Cigar Stores Co.*, 39 Misc. 500, 80 N. Y. Supp. 401 (1902); *Balk v. Harris*, 124 N. C. 467, 45 L. R. A. 258, 70 Am. St. Rep. 606, 32 S. E. 799 (1899) (reversed by Supreme Court of the United States); *Strause Bros. v. Aetna F. Ins. Co.*, 126 N. C. 223, 48 L. R. A. 452, 35 S. E. 471 (1900); *Renier v. Hurlbut*, 81 Wis. 24, 50 N. W. 783 (1891).

<sup>36</sup> *Molyneux v. Seymour*, 30 Ga. 440, 76 Am. Dec. 662 (1860); *Rothschild v. Knight*, 176 Mass. 48, 57 N. E. 337 (1900); *Dinkins v. Crunden-Martin Woodenware Co.*, 99 Mo. App. 310, 73 S. W. 246 (1903); *Sexton v. Phoenix Ins. Co.*, 132 N. C. 1, 43 S. E. 479 (1903); *Berry Bros. v. Davis*, 77 Tex. 191, 19 Am. St. Rep. 748, 13 S. W. 978 (1890); *Ward v. Morrison*, 25 Vt. 593 (1853); *Bragg v. Gaynor*, 85 Wis. 468, 21 L. R. A. 164, 55 N. W. 919 (1893).

<sup>37</sup> *Tootle v. Coleman*, 57 L. R. A. 120, 46 C. C. A. 132, 107 Fed. 41 (1901); *Wyeth Hardware & Mfg. Co. v. Lang*, 127 Mo. 242, 27 L. R. A. 651, 48 Am. St. Rep. 626, 29 S. W. 1010 (1895); *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. 134 (1889); *Hawley v. Hurd*, 72 Vt. 122, 52 L. R. A. 195, 82 Am. St. Rep. 922, 47 Atl. 401 (1900).



nishment, laid stress on the fact that the debt also was foreign, as if both elements were necessary to a refusal of jurisdiction.<sup>38</sup>

But the notion that garnishment is an ordinary action against the garnishee in combination with another personal action, an action against the principal debtor, has led the courts gradually to decide that garnishment proceedings will lie in any place in which personal jurisdiction may be obtained over the garnishee. In short, the original conception of garnishment as a proceeding based on jurisdiction *in rem* over a thing has been entirely superseded by a conception of garnishment as a transitory personal action against the garnishee. This has usually been held, where the garnishee is a foreign corporation doing business within the state, and therefore, in a sense resident there, though not technically domiciled therein,<sup>39</sup> but has not been confined to incorporated garnishees.<sup>40</sup>

Efforts to limit this doctrine in certain cases have failed. Thus it has been urged that where a railroad runs into two states and is

<sup>38</sup> *Mason v. Beebee*, 44 Fed. 556 (1890) (debt payable elsewhere); *Central Trust Co. v. Chattanooga R. & C. R. Co.*, 68 Fed. 685 (1895) (debt payable elsewhere); *Reimers v. Seatco Mfg. Co.*, 30 L. R. A. 364, 17 C. C. A. 228, 37 U. S. App. 426, 70 Fed. 573 (1895) (debt payable elsewhere); *Illinois C. R. Co. v. Smith*, 19 L. R. A. 577, 70 Miss. 344, 12 So. 461 (1893) (debt payable elsewhere); *Towle v. Wilder*, 57 Vt. 622 (1885) (debt payable elsewhere).

<sup>39</sup> *Mooney v. Buford & G. Mfg. Co.*, 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32 (1896); *National F. Ins. Co. v. Ming*, 7 Ariz. 6, 60 Pac. 720 (1900); *Kansas City P. & G. R. Co. v. Parker*, 69 Ark. 401, 86 Am. St. Rep. 205, 63 S. W. 996 (1901); *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581 (1882); *Wabash R. Co. v. Dougan*, 142 Ill. 248, 34 Am. St. Rep. 74, 31 N. E. 594 (1892); *Pomeroy v. Rand, McN. & Co.*, 157 Ill. 176, 41 N. E. 636 (1895); *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 32 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631 (1897); *Roche v. Rhode Island Ins. Asso.*, 2 Ill. App. 360 (1878); *Glover v. Wells*, 40 Ill. App. 350 (1890); *Missouri P. R. Co. v. Flannigan*, 47 Ill. App. 322 (1892); *Moore v. Chicago, R. I. & P. R. Co.*, 43 Iowa 385 (1876); *Mooney v. Union P. R. Co.*, 60 Iowa 346, 14 N. W. 343 (1882); *Burlington & M. River R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. 622 (1884); *Pittsburgh C. C. & St. L. Ry. v. Bartels*, 108 Ky. 216, 56 S. W. 152 (1900); *Harvey v. Great Northern R. Co.*, 50 Minn. 405, 17 L. R. A. 84, 52 N. W. 905 (1892); *Howland v. Chicago, R. I. & P. R. Co.*, 134 Mo. 474, 36 S. W. 29 (1896); *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 32 Atl. 663 (1895); *Fithian v. New York & E. R. Co.*, 31 Pa. 114 (1857); *Datz v. Chambers*, 3 Pa. Dist. R. 353 (1894); *Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co.*, 95 Va. 515, 40 L. R. A. 237, 28 S. E. 888 (1898); *Neufelder v. German American Ins. Co.*, 6 Wash. 336, 22 L. R. A. 287, 36 Am. St. Rep. 166, 33 Pac. 870 (1893); *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300 (1903).

In *Holt v. Ladd*, 71 Vt. 204, 44 Atl. 69 (1899) garnishment was allowed where the debt was contracted within the state.

<sup>40</sup> *Balk v. Harris*, 198 U. S. 215, 25 Sup. Ct. 125, 49 L. ed. 1023 (1904).

chartered in each it is impossible to reach the foreign corporation within whose state the garnished claim arose.<sup>41</sup> So in a few cases garnishment is denied where to allow it would enable the creditor to evade the local law as to exemptions.<sup>42</sup> These limitations are unsound ; but an exception must probably be allowed in the case of a judgment, which cannot be reached by garnishment proceedings outside the state in which it was rendered.<sup>43</sup>

Since the decision of a garnishment suit is a judgment, and is protected as such by the Supreme Court of the United States, that court obviously has the last word on the subject. The history of the question in that court is peculiar. No case appears to have been carried to the court until recently. In the case of *Chicago, Rock Island and Pacific Railway v. Sturm*<sup>44</sup> the court held that a judgment against a resident garnishee was binding although the principal debtor was absent. The reasoning of the court was open to criticism, especially the attempted distinction between the right of the creditor and the obligation of the debtor, and led the Court into an untenable decision. As a result in *Harris v. Balk*<sup>45</sup> the court quite ignored the nature of the proceeding as *quasi in rem*, and held that a garnishee could be held in any jurisdiction where he may be served with process. Mr. Justice Peckham said:

"We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original *situs* of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the state where the attachment is issued. Power over the garnishee confers jurisdiction on the courts of the State where the writ issues. If, while temporarily there, his creditor might sue him there and

<sup>41</sup> *Wells v. East Tennessee V. & G. Co.*, 74 Ga. 548 (1885). *Contra*, *Holland v. Mobile & O. R. Co.*, 16 Lea 414 (1886); *Mobile & O. R. Co. v. Barnhill*, 91 Tenn. 395, 30 Am. St. Rep. 889, 19 S. W. 21 (1892); *Georgia & A. R. Co. v. Stollenwerck*, 122 Ala. 539, 25 So. 258 (1898).

<sup>42</sup> *Drake v. Lake Shore & M. S. R. Co.*, 69 Mich. 168, 13 Am. St. Rep. 382, 37 N. W. 70 (1888). *Contra*, *R. R. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144 (1899); *Williams v. St. Louis & S. W. R. Co.*, 109 La. 90, 33 So. 94 (1902). And see *Goodwin v. Clayton (N. C.)*, 67 L. R. A. 33, 49 S. E. 173 (1904).

<sup>43</sup> *Boyle v. Musser-Sauntry Land, Logging & Mfg. Co.*, 88 Minn. 456, 97 Am. St. Rep. 538, 93 N. W. 520 (1903); *Tourville v. Wabash R. Co.*, 148 Mo. 614, 71 Am. St. Rep. 650, 50 S. W. 300 (1899); *Noble v. Thompson Oil Co.*, 79 Pa. 354, 21 Am. St. Rep. 66 (1876).

<sup>44</sup> 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144 (1899).

<sup>45</sup> 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023 (1904).



recover the debt, then he is liable to process of garnishment, no matter where the *situs* of the debt was originally."

This language would have force if the process were merely to enjoin payment of the garnishee's debt until the other parties could be brought to a settlement. But the process of garnishment does not stop with an injunction against paying the debt. It results in a judicial discharge of the debt; and what power has the court into whose territory a debtor temporarily comes to discharge the debt as against the absent creditor? Or, for that matter, what power has the court of the debtor's domicile? It cannot discharge the debt by proceedings in insolvency;<sup>46</sup> nor will a bill in equity lie to adjust rival claims to payment where one of the rivals is absent.<sup>47</sup> The decision is absolutely opposed to the decisions of many of the best courts in this country.<sup>48</sup>

Garnishment obviously can be just only when it results in a discharge of the garnishee from his debt. Justice requires that if a garnishee is called upon to pay his debt to the plaintiff he shall be absolutely protected against suit by the defendant in another jurisdiction. It is impossible, however, for the court which allows garnishment proceedings to protect the garnishee against a suit in another jurisdiction for the recovery of a debt unless the principal defendant is himself subject to the jurisdiction of the court; for if he was not a party to prior proceedings they are not as to him *res judicata* and he may therefore sue in another state to recover payment. The garnishee, to be sure, would be entitled to equity protection in so far as he had actually paid the creditor's debt but the burden would be upon him to prove the existence of the debt.

<sup>46</sup> *Ogden v. Saunders*, 12 Wheat. (U. S.) 213 (1827); *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589, 24 N. E. 917 (1890).

<sup>47</sup> *Mahr v. Norwich U. F. I. Society*, 127 N. Y. 452, 28 N. E. 391 (1891).

<sup>48</sup> In addition to the cases cited in notes 33 and 34, *ante*, see the following cases: *Louisville & N. R. R. v. Dooley*, 78 Ala. 524 (1885); *Louisville & N. R. R. v. Nash*, 118 Ala. 477, 23 So. 825 (1897); *Green v. Farmers' & C. Bank*, 25 Conn. 452; *Central R. Co. v. Brinson*, 109 Ga. 354, 77 Am. St. Rep. 382, 34 S. E. 597 (1899); *McBee v. Purcell Nat. Bank*, 1 Ind. Terr. 288, 37 S. W. 55 (1896); *Bush v. Nance*, 61 Miss. 237 (1883); *Keating v. American Refrigerator Co.*, 32 Mo. App. 293 (1888); *Walker v. N. K. Fairbanks & Co.*, 55 Mo. App. 478 (1893); *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90 (1886); *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849, 40 Am. St. Rep. 522, 56 N. W. 711 (1893); *Bullard v. Chaffee*, 61 Neb. 83, 51 L. R. A. 715, 84 N. W. 604 (1900); *Morawetz v. Sun Ins. Office*, 96 Wis. 175, 65 Am. St. Rep. 43, 71 N. W. 109 (1897).

He is now protected to be sure in all states of the Union by the constitutional provision for full faith and credit to the judicial proceeding of other states; for the supreme court has held not only that there is jurisdiction for garnishment in any court which has personal jurisdiction over the garnishee, but also that the garnishment process discharges the debt of the garnishee in so far as he pays it in that process; and therefore that he may plead this judicial discharge in any other state of the United States. The Constitution, however, is without power to protect the garnishee in another country; and when he is forced to pay under such circumstances he is, therefore, forever barred from spending the summer in European travel or a winter in Cuba except at the risk of being forced again to pay the debt from which the Supreme Court of the United States would vainly have tried to discharge him. The English courts, at least, would probably deny the effect of the discharge.<sup>49</sup>

Even the Supreme Court of the United States could not protect the garnishee against the obligation to pay the debt again in the interesting case of *Ward v. Boyce*.<sup>50</sup> A "trustee process" had been brought in Vermont against the husband of the present plaintiff as principal debtor and the present defendant as trustee. The debt was a promissory note claimed to belong to the husband; and in Vermont it was adjudged that the trustee owed the absent husband, and he was forced by the trustee process to pay the note. He is now sued in New York by the wife, who proves her title to the note. The court is, therefore, compelled to give judgment for the wife, and to hold that the debt had not been paid as a result of the trustee process; because, as the court said, the existence of the trustee debt was a necessary jurisdictional fact, and since the debt alleged, that is, a debt due to the husband, did not in fact exist, the Vermont proceedings were *coram non judice*.

This, however, is not the only objection to the garnishment process as it has been developed by the courts. It is unjust not only to the garnishee but also and chiefly to the principal defendant; for it permits him to be subjected to doubtful or even fraudulent claims without redress. An owner of property may determine the situs of the property he owns, and may justly be subjected

<sup>49</sup> *Gibbs v. Société Industrielle*, 25 Q. B. D. 399; *Mayor of London v. Cox*, L. R. 2 H. L. 239 (1890).

<sup>50</sup> 152 N. Y. 191, 36 L. R. A. 549, 46 N. E. 180 (1897).



to the action of the courts within whose territory his property is found. The creditor, however, has no power to fix the personal presence of his debtor at one place or another. For all the creditor can do, the debtor may travel where he will. It is, therefore, unjust to submit the creditor's claim to the accident of the debtor's presence in one state or another. Yet, according to the current doctrine, if the debtor is travelling a thousand miles away from the creditor's domicil he may there be garnished and be compelled to pay a claim which is alleged to be a legal claim against the creditor. To be sure if the creditor happens to have notice of the suit, which can usually be obtained only by careful reading of the newspaper published where the suit is brought, he has a right to defend himself; but unless the claim as made in the garnishment proceedings is a very large one it will hardly pay him to travel across the country in order to meet the charge, taking with him his evidence. Without doing so, his effort to disprove the claim, however groundless it may be, is practically hopeless; the absent is always wrong, just as surely in court as in the outside world. He may send on his deposition; but a deposition is of very little force against the actual living testimony of the plaintiff. He may employ counsel; but counsel is helpless without witnesses. Garnishment, therefore, is practiced at the present day as a safe and easy instrument of fraud.

The practical objection to the established rule has never been more forcibly stated than by Willes, J., in *Mayor of London v. Cox*.<sup>51</sup>

"A foreign merchant, say at New York or San Francisco, opens an account at Lafitte's [in Paris], or at Coutt's, to meet bills which he has accepted, or pay for French or English merchandise. Is it to depend upon whether Lafitte happens to visit London and walk into the City, or whether Coutt's do business in the City through one of the firm, or only through the intervention of a clerk, that the Mayor's Court shall have jurisdiction to attach the balances in Paris or in London to answer a foreign claim, which may be bad or indifferent, but is good enough to procure the dishonor of the bills, and to destroy the foreign merchant's credit before he can take means to dissolve the attachment? The defendant may have an answer, by way of payment, or release,

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<sup>51</sup> L. R. 2 H. L. 239, 268.

or discharge by the law of his own country, which he may despair of establishing according to the rules of evidence used in a foreign jurisdiction; or a bar by way of prescription, which, as being matter of procedure, will be inadmissible there. The place where he is sued may thus be all-important; and shall it depend upon the will of his debtor, who is in default, to elect for him a jurisdiction? That would be to affect A. by the unauthorized act of B., over whom he has no control; and, therefore, it is not merely different from law, which a valid custom may be, but contrary to a principle of justice, which no valid custom can be."

It is submitted that the French method of dealing with the problem is far preferable to our own. This process begins with an injunction (*saisie-arrêt*) against the garnishee paying the debt to the principal defendant; this process is, of course, in the garnishee's court. A suit between the principal parties follows, to determine the validity of the principal claim; and that suit is brought in the court which has jurisdiction of that particular claim, that is, the court of the principal debtor. If judgment issues against the defendant in that suit, it may be enforced by payment of the garnished debt into court to discharge it. The process is clearly illustrated in a judgment of the Civil Tribunal of the Seine,<sup>52</sup> which has been translated as follows:

"THE COURT. Todesco, an Austrian subject domiciled at Vienna, alleges that Dumont, a German without known domicil at Paris, residing in London, should be ordered to pay him 44,700.95 francs, the amount of a note made by Dumont to Todesco, dated Augsburg, March 9, 1876, registered at Paris, Aug. 16, 1889. Todesco further prays the court to validate the garnishment made by him upon this note, on Betzold, a banker of Paris, Aug. 16, 1889. Incidentally Todesco moves that the question of validation be continued until a competent court has passed on the validity of the principal obligation. Dumont pleads to the jurisdiction of this court, on the ground that the parties are foreigners, and the obligation was contracted in another country.

"Though the court is incompetent in such a case to determine, as between strangers, the existence of the obligation, it is on the contrary competent to pass upon the legality of an attachment or of a

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<sup>52</sup> *Todesco v. Dumont*, 18 *Clunet* 559; translated, 1 *Beale*, *Cases on Conflict of Laws*, 434.



levy of execution resulting from a garnishment made within its jurisdiction. It ought always to grant a continuance to the attaching creditor to enable him to prove his claim before a competent court, on penalty, in case of failure to do so, of nullity of the whole process.

"On these grounds the court has jurisdiction only of the question of the validity of the garnishment. A continuance is granted for six months from this date, within which time, on penalty of nullity, Todesco shall sue said Dumont, on the principal obligation, before a court of competent jurisdiction."

*Joseph Henry Beale.*

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## THE RIGHT TO FOLLOW MONEY WRONGFULLY MINGLED WITH OTHER MONEY.

IF money to which one person is legally or equitably entitled is wrongfully mingled by another with money of his own, so that the whole forms one indistinguishable mass, it was at one time held that all right to follow it is lost because it can no longer be identified; for, as it was said, "money has no earmark."<sup>1</sup> This is, of course, a good reason why the person wronged cannot insist that any particular coins are his; but it is no reason why he should be denied an interest in the product, no reason why he should be relegated to a merely personal claim against the wrongdoer. This early doctrine is accordingly no longer law.<sup>2</sup>

Where money is thus wrongfully confused, the person wronged has two possible equitable remedies whereby he may proceed against the commingled fund or against any property for which it is exchanged by the wrongdoer. First, he may claim an equitable lien or charge on the whole mass for the amount contributed by him. Second, he may claim that the mass in equity belongs in part to him, his interest being proportional to the amount contributed by him, and may charge the wrongdoer as constructive trustee for

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<sup>1</sup> *Ex parte Dale & Co.*, 11 Ch. D. 772 (1879). At one time it was even thought that if a factor sells goods for his principal, the principal is not entitled to the specific proceeds although kept separate, because money has no earmark. See *Whitcomb v. Jacob*, 1 Salk. 160 (1710); *Scott v. Surman*, Willes 400 (1742), in which cases, however, it was held that if the money is kept separate and invested in other property, that property can be reached by the principal. Later the doctrine that money cannot be followed because it has no earmark was limited to cases where the money is mingled with other money in one fund so that it can no longer be distinguished from the other money in the fund. *Ex parte Dale & Co.*, *supra*. Lord Mansfield said that the doctrine means merely that where money has been transferred to a *bonâ fide* holder for value, he may keep it. *Miller v. Race*, 1 Burr. 452 (1758), p. 457.

<sup>2</sup> *Pennell v. Deffell*, 4 DeG. M. & G. 372 (1853); *Frith v. Cartland*, 2 H. & M. 417 (1865); *Knatchbull v. Hallett*, 13 Ch. D. 696 (1879); *Nat. Bk. v. Ins. Co.*, 104 U. S. 54 (1881). The *dictum* in *Randolph v. Allen*, 73 Fed. 23 (1896), p. 39, that the claimant has no interest in the mingled fund (though perhaps justified by the language, but not by the decision, in *Litchfield v. Ballou* 114 U. S. 190 (1884)), is not law. See *In re Mulligan*, 116 Fed. 715 (1902), p. 717; *Primeau v. Granfield*, 184 Fed. 480 (1911), p. 483.



him to that extent. The former may be called for convenience the lien remedy; the latter, the constructive trust remedy.

The lien remedy seems clearly justifiable. The wrongdoer owes a duty to the claimant to restore to him what was wrongfully taken from him. It is the wrongdoer's own fault that he cannot identify his own contribution. Therefore, to make reparation, he should use, and a court of equity will compel him to use, so far as necessary, the fund which is made up in part of the money of the claimant. In other words, the claimant has an equitable lien on the whole fund. The creditors of the wrongdoer cannot object. Since they are not purchasers for value, they stand no better than their debtor. They have no direct legal or equitable interest in their debtor's property, and take subject to any equitable interest which another may have in the property. The claimant's lien is therefore available against the general creditors of the wrongdoer.<sup>3</sup>

The constructive trust remedy, although not so often resorted to in cases where there has been mingling as in cases where there has been no mingling, seems also justifiable on principle. Where there has been no mingling, it has long been settled law that the claimant's money, or, if it is converted into other property, its product, can be recovered by him in specie and that he is not confined to a lien upon the money or its product.<sup>4</sup> It makes no differ-

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<sup>3</sup> Taylor v. Plumer, 3 M. & S. 562 (1815); Frith v. Cartland, 2 H. & M. 417 (1865); Harris v. Truman, 7 Q. B. D. 340 (1881); Gorman v. Littlefield, 229 U. S. 19 (1913); Amer. Sugar Refining Co. v. Fancher, 145 N. Y. 552 (1895). In Taylor v. Plumer, *supra*, Lord Ellenborough said (p. 574): "An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him." In Amer. Sugar Refining Co. v. Fancher, *supra*, it was said (p. 560): "It is claimed that the general creditors of the [wrongdoer] will be prejudiced if the plaintiff is allowed to prevail, and that he will thereby acquire a preference over the other creditors of the insolvent [wrongdoer]. But general creditors have no equity or right to have appropriated to the payment of their debts the property of the plaintiff, or property to which it is equitably entitled as between it and [the wrongdoer]."

The same result is reached whether the claimant's right is regarded as a right *in rem* (POMEROY, EQUITY JURISPRUDENCE, 3 ed., sec. 105) or a right *in personam* (MAITLAND, LECTURES ON EQUITY AND THE FORMS OF ACTION, p. 142).

In nearly all of the cases cited below in which the claimant was given a lien, the question arose between him and the general creditors or trustee in bankruptcy of the wrongdoer.

<sup>4</sup> PERRY, TRUSTS, 6 ed., secs. 127, 128; POMEROY, EQUITY JURISPRUDENCE, 3 ed., secs. 1049, 1051. Although undoubtedly the claimant may hold the wrongdoer as constructive trustee when he is a misappropriating trustee or other fiduciary, and although the lien remedy is available even where the wrongdoer is not a fiduciary (Humphreys

ence whether or not the wrongdoer intends to give the claimant an interest in the product.<sup>5</sup> Where the product is more valuable than the money, he will come out more than whole. But, since it is his money that earned the profit, and since he ran the risk of losing his money (although it is true that even if his money had been lost he would still have had a personal claim against the wrongdoer), it seems just to give him the profit. Moreover, it is a wise policy not to allow the wrongdoer to keep the profit of his own wrong, although the profit is not strictly at the expense of the claimant.

The same principle should apply where the claimant's money is mingled with that of the wrongdoer, and is therefore only partly instrumental in earning the profit. The claimant should be entitled to a share of the profit, in so far as his property contributed to earning the profit. It has been said that in such case he should

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*v. Butler*, 51 Ark. 351 (1888); *Harrison v. Tierney*, 254 Ill. 271 (1912); *Edwards v. Culbertson*, 111 N. C. 342 (1892); and see the numerous cases where, as in *Brennan v. Tillinghamst*, 201 Fed. 609, 615 (1913), a bank obtains deposits by fraudulently concealing its insolvent condition, it has been held in a few cases that the constructive trust remedy is not available against others than fiduciaries. *Campbell v. Drake*, 4 Ired. Eq. 94 (1845); *Hart v. Dogge*, 27 Neb. 256 (1889); and cases cited by Professor Ames in 19 HARV. L. REV. 513, note 5. The distinction seems arbitrary and the weight of authority is properly the other way. *O'Neill v. O'Neill*, 227 Pa. 334 (1910); and see cases cited in 19 HARV. L. REV. 513, note 6, and in POMEROY, EQUITY JURISPRUDENCE, 3 ed., sec. 1051. The courts holding the minority view seem to have been misled by the term "trust." Perhaps almost as much confusion with regard to equitable rights and remedies has been caused by the use of the term "trust" as has been caused with regard to legal rights and remedies by the term "contract." It is not always seen that a constructive trust is not a right but a remedy. It is, of course, very different from a true trust which is a fiduciary relationship and one created in pursuance of the intent of the parties. If equity creates and specifically enforces an obligation to convey certain definite property and if that obligation is imposed on equitable grounds independent of the intent of the parties, as on grounds of redressing a tort or preventing unjust enrichment, then the property is said to be held in constructive trust. The constructive trust is the result of the right of specific enforcement of the obligation. It is the name given to the remedy, not the right for which the remedy is given. There is as good reason in the case of a non-fiduciary as in the case of a fiduciary for imposing a duty to surrender property acquired by a wrongful act; it should make no difference whether it is acquired by breach of trust or other fiduciary obligation, or by fraud or theft.

<sup>5</sup> In *Taylor v. Plumer*, 3 M. & S. 562 (1815), the defendant unsuccessfully contended that where the money is converted into other property, no trust attaches to that property unless the wrongdoer intended to subject the property to the trust. In several earlier cases the court had laid unnecessary stress on the fact that the wrongdoer did so intend. *Waite v. Whorwood*, 2 Atk. 159 (1741); *Deg v. Deg*, 2 P. Wms. 412 (1727), p. 414; *Wilson v. Foreman*, 2 Dick. 593 (1782) (as explained in *Lench v. Lench*, 10 Ves. 511 (1805), p. 519).



be confined to a lien.<sup>6</sup> But, by the weight of authority, the claimant is given the option of a lien on, or a *pro rata* share of, the product.<sup>7</sup> The creditors of the wrongdoer should no more be allowed to object to the constructive trust, than to the lien. They should not stand in a better position than their debtor; they should not be allowed to profit by his wrongful act. They are not purchasers for value, and they take subject to the claimant's equitable interest in the property.<sup>8</sup>

If, after the funds have been mingled, nothing further is done, and the value of the mass remains constant, the result will be the same no matter which remedy is pursued. The claimant will come out exactly whole, no more and no less. Thus, if A wrongfully takes \$1000 belonging to B, and mingles it with \$1000 of his own, B is entitled to \$1000 from the fund, whether he claim one half of the fund, or a lien on the fund for \$1000.

So, too, if the wrongdoer merely adds further contributions of his own, the result will be the same, and B will get full satisfaction on either theory. Thus, if in the example suggested above, A adds \$2000 more of his own, B is entitled to \$1000, whether he claim the proportion of the fund contributed by him, namely one fourth of \$4000; or whether he claim a lien on the \$4000 for \$1000.

If, however, the whole fund is exchanged for property which is or becomes greater in value than the fund, the claimant comes out better by proceeding on the constructive trust theory; if it is or becomes less valuable than the fund, he finds the lien theory more

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<sup>6</sup> See the *dictum* of Jessel, M. R., in *Knatchbull v. Hallett*, 13 Ch. D. 696 (1879), p. 709. But see an explanation of this *dictum* in *Primeau v. Granfield*, 184 Fed. 480 (1911), p. 485. In *Bresnihan v. Sheehan*, 125 Mass. 11 (1878), the court gave only a lien, although on principle it would seem that the claimant was entitled to a *pro rata* share.

<sup>7</sup> *Wedderburn v. Wedderburn*, 4 Myl. & C. 41 (1838); *Primeau v. Granfield*, 184 Fed. 480 (1911) (reversed on another ground in s. c., 193 Fed. 911 (1911)); *Treacy v. Power*, 112 Minn. 226 (1910); *Shearer v. Barnes*, 118 Minn. 179 (1912); *Fant v. Dunbar*, 71 Miss. 576 (1893); and cases cited in 19 HARV. L. REV. 512, note 2. *In re Oatway*, [1903] 2 Ch. 356, and some of the other cases there cited, are, however, illustrations of a lien rather than of a constructive trust.

So, too, if the wrongdoer commingles the money of two persons without contributing any money of his own, and the fund is profitably invested, the persons wronged share the product *pro rata*. See *Lord Provost v. Lord Advocate*, 4 App. Cas. 823 (1879).

<sup>8</sup> *Byrne v. McGrath*, 130 Cal. 316 (1900); *Kepler v. Davis*, 80 Pa. 153 (1875). The doubt expressed in *Smith v. Township of Au Gres*, 150 Fed. 257 (1906), p. 261, and in *Greene v. Haskell*, 5 R. I. 447 (1858), p. 457, does not seem to be well founded.

advantageous. Thus, if A wrongfully mingles \$1000 of his own with \$1000 of B's, and with the product buys land which is worth \$3000, it is more advantageous to claim half of the land, than a lien on it for \$1000. If the land is worth \$1000, it is more advantageous to claim a lien on it for \$1000, than half of the land.

Now, let it be supposed that after he has wrongfully mingled his money with that of the claimant, a part of the fund is withdrawn by the wrongdoer and dissipated. Here the claimant has a lien on, or a *pro rata* share of, what is left.<sup>9</sup> The reason generally given in the cases, is that suggested in the case of *Knatchbull v. Hallett*,<sup>10</sup> namely, that it should be presumed that the wrongdoer intends to draw out his own money, because to draw out the claimant's money would be dishonest. This is, of course, a pure fiction,<sup>11</sup> and as usually happens when a proper result is reached by fictitious reasoning, has led to erroneous results in other cases.<sup>12</sup> It seems to be thought necessary to show in what part of the commingled fund the claimant's money is to be found; and as it is impossible actually to distinguish the claimant's contribution, the courts have resorted to a presumption as to the intent of the wrongdoer, although there is no reason to suppose that he had any particular intent, and no reason for allowing his intent to affect the claimant's rights. The claimant ought, it is true, to have an interest in what is left, not because of any intent of the wrongdoer, but because the wrongdoer, whatever his intent, should not be allowed by taking away a part of the fund, to deprive the claimant of his lien on, or share of, the rest of the fund.

Where, instead of physically mingling the money, the wrongdoer deposits in a bank in the same account, his own and the claimant's money, it was held in the case of *Pennell v. Deffell*<sup>13</sup> that the rule

<sup>9</sup> See cases cited in notes 16 and 18, *infra*.

<sup>10</sup> 13 Ch. D. 696 (1879), p. 726.

<sup>11</sup> See *Primeau v. Granfield*, 184 Fed. 480 (1911), p. 484; *In re A. O. Brown & Co.*, 189 Fed. 432 (1911), p. 434.

<sup>12</sup> See the discussion, *infra*, of *In re Oatway*, [1903] 2 Ch. 356, and the other cases where the part withdrawn is preserved and the remainder dissipated.

<sup>13</sup> 4 DeG. M. & G. 372 (1853). The decision in this case on this point was followed in *Brown v. Adams*, L. R. 4 Ch. 764 (1869). In *Pennell v. Deffell* it was conceded that in case of physical mingling, Clayton's case has no applicability and that the withdrawal of part would not destroy the claimant's lien on the remainder. 4 DeG. M. & G. 372 (1853), p. 382.



in Clayton's Case<sup>14</sup> applies. By this rule, the first withdrawals from an account in a bank are charged against the first deposits. As between the depositor and the bank, this rule is fair enough; for it is a question of intent as to what part of the account is paid when the depositor makes a withdrawal, and since it is necessary to have some definite rule, in the absence of any evidence of actual intent, this rule is adopted because it comes as near as any to expressing the probable intent. In cases of a wrongful mingling of deposits, however, the rule is wholly inapplicable in determining the relation between the wrongdoer and the claimant. By depositing the whole in one account, the wrongdoer has confused his money and that of the claimant, as inextricably as though he had physically mingled the money. He has, by the use of the two funds, acquired a single chose in action. That whole chose in action, therefore, is subject to a lien of the claimant, or, on the constructive trust theory, is partially owned by him. The wrongdoer, whatever his intent, cannot shake off the interest of the claimant. *Pennell v. Deffell* has accordingly been overruled on this point, and it is now held that the claimant has an interest in the balance, regardless of the order of deposit.<sup>15</sup>

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<sup>14</sup> 1 Mer. 572 (1816).

<sup>15</sup> *Knatchbull v. Hallett*, 13 Ch. D. 696 (1879), p. 726, a case which has met with universal approval in this country. In the case of *In re A. O. Brown & Co.*, 189 Fed. 432 (1911), in speaking of the rights of a claimant whose money has been wrongfully mingled by another with money of his own in a bank in one account from which the wrongdoer has withdrawn and dissipated a part, the court said (p. 434): "All the deposits taken together constitute an obligation of the banker's, a single chose in action, amounting in total to the sum of the deposits. Upon that chose in action the beneficiary has a lien, if he wishes to assert it, equal to the sum of money which his property has contributed to it. So in this case the claimants may elect to retain a lien upon the total deposit after the first withdrawal. This is the effect of the case of *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, a case which has been very frequently cited and the decision of which has been followed many times. This is sometimes stated as a presumption of the trustee's intent, but that is a fiction."

If the wrongdoer commingles the money of two persons without contributing any money of his own, and subsequently makes withdrawals, it has been held that the rule in Clayton's Case applies. *Knatchbull v. Hallett*, 13 Ch. D. 696 (1879); *Hancock v. Smith*, 41 Ch. D. 456 (1889) (*semble*); *In re Stenning*, [1895] 2 Ch. 433; *Mutton v. Peat*, [1899] 2 Ch. 556, p. 560 (*semble*); *Empire State Surety Co. v. Carroll County*, 194 Fed. 593 (1912), p. 605; *Hewitt v. Hayes*, 205 Mass. 356 (1910), p. 365. But *cf. In re Mulligan*, 116 Fed. 715 (1902), p. 719. This seems erroneous on principle. It would seem that on the constructive trust theory the persons wronged should be treated as co-owners in proportion to the amounts contributed by them, and the loss

Whether, therefore, the money of the wrongdoer and the claimant is physically mingled, or is deposited in a single account, as long as there is always a balance on hand, at least as large as the amount of the claimant's contribution, he will, by pursuing the lien remedy, come out whole. Thus, if A wrongfully mingles \$1000 of his own and \$1000 of B's. and then withdraws \$1000 which he dissipates, B on the lien theory, has a charge on what is left for the amount contributed by him, that is, he is able to get his \$1000 in full;<sup>16</sup> on the constructive trust theory he gets one half of what is left, or \$500.<sup>17</sup> If, however, the fund is diminished below the amount of the claimant's contribution, he will lose *pro tanto*;<sup>18</sup> and, if the fund is exhausted, his interest is lost.<sup>19</sup>

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resulting from any withdrawals, like the gain from a rise in value (Lord Provost v. Lord Advocate, 4 App. Cas. 823 (1879)), should be shared by them *pro rata*. On the lien theory it would seem that the same result should follow. Compare the rules that are applied at law with respect to confusion of grain or other fungible property.

<sup>16</sup> Knatchbull v. Hallett, 13 Ch. D. 696 (1879), p. 731; Massey v. Fisher, 62 Fed. 958 (1894); Hutchinson v. LeRoy, 113 Fed. 202 (1902); *In re Royea's Estate*, 143 Fed. 182 (1906); Smith v. Mottley, 150 Fed. 266 (1906); Butler v. Western German Bank, 159 Fed. 116 (1908); *In re Stewart*, 178 Fed. 463 (1910); Elizalde v. Elizalde, 137 Cal. 634 (1902); Whitcomb v. Carpenter, 134 Ia. 227 (1907); Fogg v. Tyler, 109 Me. 109 (1913); Commissioners v. Wilkinson, 119 Mich. 655 (1899); Patek v. Patek, 166 Mich. 446 (1911); Blair v. Hill, 50 App. Div. (N. Y.) 33 (1901) (affirmed s. c., 165 N. Y. 672 (1901)); Widman v. Kellogg, 22 N. D. 396 (1911); Emigh v. Earling, 134 Wis. 565 (1908).

<sup>17</sup> He cannot on the constructive trust theory take a larger share of one part by surrendering his claim on the rest. He is a co-owner of the whole and of every part of the whole, and a mere separation of the whole into parts and a change in the form of any of those parts or a loss of any of the parts, as by a sale of it to a purchaser without notice, will not change the nature or extent of his interest in the rest. *Watson v. Thompson*, 12 R. I. 466 (1879), p. 471. In this case the court said: "The complainant seems to suppose that, having lost his resulting interest in what was sold, he can have the loss made good to him by a proportional increase of interest in what is left. But this surely cannot be so. His interest was inherent in every part. As soon as any part was sold his interest in that part was converted into an interest in the price received for it. It remained a resulting trust or equity in the price, or in the property in which the price was invested, so long as it could be traced specifically; and when it ceased to be specifically traceable, it became simply a personal debt or demand to be recovered of [the wrongdoer], or out of his estate like any other personal debt or demand."

<sup>18</sup> *Bank of British N. A. v. Freights*, 127 Fed. 859 (1904) (affirmed s. c., 137 Fed. 534 (1905)); *Woodhouse v. Crandall*, 197 Ill. 104 (1902); *Waddell v. Waddell*, 36 Utah 435 (1909); *State v. Foster*, 5 Wyo. 199 (1894).

<sup>19</sup> *Beard v. Independent District*, 88 Fed. 375 (1898); *In re Brown*, 193 Fed. 24 (1912) (affirmed *sub nom.* *First Nat. Bank v. Littlefield*, 226 U. S. 110 (1912)); *In re M. E. Dunn & Co.*, 193 Fed. 212 (1912); *Re Assignment of Bank of Oregon*, 32 Ore. 84 (1897).



Now, it so happened, that in the earlier cases the part first withdrawn from the commingled fund was invariably dissipated, and the claimant wished to establish an interest in the remainder, which interest he was allowed, as has been stated, on the ground that it is presumed that the wrongdoer withdraws his own money first. But when the part first withdrawn is invested or otherwise preserved, and the remainder is dissipated, the application of that presumption would throw a loss on the claimant. In the case of *In re Oatway*,<sup>20</sup> the wrongdoer made an investment of part of the fund, leaving an amount greater than the contribution of the claimant, which amount he later dissipated. The court refused to apply the presumption, and held that the claimant had a charge on the property in which the money withdrawn was invested. If the part drawn out had been treated as belonging to the wrongdoer, the claimant would have had no interest in the product of that part. This decision seems obviously right, and although the authorities are not unanimous,<sup>21</sup> a similar result has been reached in several cases in this country.<sup>22</sup> The separation of the fund into

<sup>20</sup> [1903] 2 Ch. 356.

<sup>21</sup> In the following cases the claimant was not allowed to reach the proceeds of withdrawals when the withdrawals did not diminish the fund below the amount of the claimant's contribution, because of the fictitious presumption that the part drawn out belonged to the wrongdoer: *Board of Commissioners v. Strawn*, 157 Fed. 49 (1907); *In re City Bank of Dowagiac*, 186 Fed. 413 (1910); *In re Brown*, 193 Fed. 24 (1912); (affirmed, without mention of this point, *sub nom.* *First Nat. Bank v. Littlefield*, 226 U. S. 110 (1912)); *Empire State Surety Co. v. Carroll County*, 194 Fed. 593 (1912); *Covey v. Cannon*, 104 Ark. 550 (1912); *Standish v. Babcock*, 52 N. J. Eq. 628 (1894); *Waddell v. Waddell*, 36 Utah 435 (1909).

In these cases it is conceded that so far as the withdrawals diminish the fund below the amount of the claimant's contribution, the claimant may follow them. But even this seems to be denied in *Bright v. King*, 20 Ky. Law Rep. 186 (1898).

In *Covey v. Cannon*, *supra*, a part of the money drawn out was redeposited, and yet it was held that the claimant was not entitled to it.

<sup>22</sup> *Brennan v. Tillinghast*, 201 Fed. 609 (1913); *City of Lincoln v. Morrison*, 64 Neb. 822 (1902), p. 831; *Lamb v. Rooney*, 72 Neb. 322 (1904). And see *Primeau v. Granfield*, 184 Fed. 480 (1911); *In re A. O. Brown & Co.*, 189 Fed. 432 (1911). In *Primeau v. Granfield*, *supra*, the court said (p. 484):

"The language about presumed intent in *Knatchbull v. Hallett*, *supra*, which Sir George Jessel laid down with his customary vigor, was merely a way of giving an explanation by a fiction of the right of the beneficiary to elect to regard his right as a lien. That it is a fiction appears clearly enough in this case where Granfield [the wrongdoer] could have had no intention about the investments as he meant to use all the money for himself anyway. To say that in such a case he will be 'presumed' to intend to take his own money out first is merely a disingenuous way common enough,

two parts, and the separate disposition of those parts, does not deprive the claimant of his equitable interest, which, since it extended to the whole, will extend to both parts or the product of both parts. This is sometimes also expressed in the form of a presumption, namely, that all sums drawn out and dissipated are presumed to be those of the wrongdoer.<sup>23</sup> This is simply another way of saying, that although part of the fund is dissipated, the lien still remains on, or the constructive trust still attaches to, any other parts, or the product of any other parts which can still be traced. Hence, if A mingles \$1000 of his own and \$1000 of B's, and draws out \$1000 and invests it in land, and then dissipates the balance, B may claim a lien on the land for \$1000; or, on the constructive trust theory, one half of the land.

If, after the wrongdoer has dissipated part of the fund, he makes new contributions out of his own funds, the additions thus made, unless they are considered a restoration of the claimant's money,<sup>24</sup> will not increase the amount the claimant is entitled to get out of the fund. On the constructive trust theory he will simply get a smaller fraction of a larger total sum. On the lien theory he is entitled to a charge upon the enlarged fund, but only for the amount of the balance of the original commingled fund. Thus, if A wrongfully mingles \$1000 of his own with \$1000 of B's, and draws out and dissipates \$1500, and then to the remaining \$500 adds \$1000 of his own, on the constructive trust theory B, who was entitled to one half of the \$500, is now entitled to one sixth of the

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to avoid laying down a rule upon the matter. This fiction in *Re Oatway* [1903] 2 Ch. Div. 356, would have brought the usual injustice which fictions do bring, when pressed logically to their conclusion. Logically, the trustee's widow, in that case, was quite right in claiming the first withdrawal, although the trustee had invested it profitably, and had subsequently wasted all of the fund which had remained in the bank. That was, of course, too much for the sense of justice of the court which awarded to the wronged beneficiary the investment, intimating that the rule in *Knatchbull v. Hallett*, *supra*, applied only where the withdrawals were actually spent and disappeared. If to that rule be added the qualification that if the first withdrawals be invested in losing ventures, then the beneficiary is to have a lien, if he likes, till he uses up that whole investment, and then may elect to fall back for the balance upon the original mixed account from which the withdrawal was made, there is no objection, but it is a very clumsy way of saying that he may elect to accept the investment if he likes, or to reject it."

<sup>23</sup> *City of Lincoln v. Morrison*, 64 Neb. 822 (1902), p. 830.

<sup>24</sup> The question under what circumstances such an addition is to be treated as a restoration of the claimant's money is considered below.



ultimate \$1500. On the lien theory he is entitled to a charge on the \$1500 for \$500. He cannot get more than that, for he has not contributed more than that to the ultimate \$1500 fund. Although he contributed \$1000 to the original fund, yet that fund was diminished to \$500; he had no interest in the other contribution to the ultimate \$1500. The claimant, in such case, can get no more than the lowest balance existing at any time between the time of deposit and the time of distribution.<sup>25</sup>

But suppose that the lowest balance is invested and earns a profit. In that event the claimant should be allowed a lien not only for the amount of that balance, but also for the profit earned by it, up to the amount originally contributed by him. Thus, if A has wrongfully mingled \$1000 of his own with \$1000 of B's, and has drawn out and dissipated \$1500, and has invested the remaining \$500 in stock which he sells for \$1500, B should be entitled to a lien on the \$1500 for \$1000.<sup>26</sup> The increase in value here comes from the fund in which the claimant had an interest, and is not a contribution added by the wrongdoer from his own funds. On the constructive trust theory, he is entitled to one-half the proceeds of the stock, or \$750.

If after the fund is reduced by withdrawals, and after an addition is made by the wrongdoer from his own funds, the total amount is then invested, it is submitted that, if the foregoing reasoning is

<sup>25</sup> *Mercantile Trust Co. v. St. Louis Ry. Co.*, 99 Fed. 485 (1900); *In re Mulligan*, 116 Fed. 715 (1902), p. 717 (*semble*); *Board of Commissioners v. Strawn*, 157 Fed. 49 (1907); *American Can Co. v. Williams*, 178 Fed. 420 (1910); *In re Brown*, 193 Fed. 24 (1912) (affirmed *sub nom.* *First Nat. Bank v. Littlefield*, 226 U. S. 110 (1912)); *In re M. E. Dunn & Co.*, 193 Fed. 212 (1912); *Powell v. Missouri Co.*, 99 Ark. 553 (1911); *Covey v. Cannon*, 104 Ark. 550 (1912); *Hewitt v. Hayes*, 205 Mass. 356 (1910).

If the whole commingled fund is withdrawn before the additions are made, the claimant's interest is lost. *In re Brown*, *supra*; *In re M. E. Dunn & Co.*, *supra*; *Hewitt v. Hayes*, *supra*. Of course, if to the lowest balance of the commingled fund additions of the claimant's money are made, he may take a sum equal to those additions plus the lowest balance. *Board of Commissioners v. Patterson*, 149 Fed. 229 (1906). See *Hewitt v. Hayes*, *supra*.

<sup>26</sup> See *In re Oatway*, [1903] 2 Ch. 356; *City of Lincoln v. Morrison*, 64 Neb. 822 (1902).

In *Waddell v. Waddell*, 36 Utah 435 (1909), after the commingled fund had been reduced below the amount of the claimant's contribution, various articles were bought. The court gave the claimant a lien on each article but only for the purchase price of that article. This seems wrong; if there was any profit it should go to the claimant. He should have a lien on all the articles for the amount of his original contribution.

correct, the claimant should have a lien on the investment for a sum equal to the lowest amount to which the fund was reduced, plus that part of the profit which can fairly be said to be the product of that amount. In other words, he should have a lien for the proportion that the lowest balance bears to the new fund composed of that balance and the additions made by the wrongdoer. Thus, if A mingles \$1000 of his own with \$1000 of B's, and then dissipates \$1500, and later adds \$500 of his own and invests the \$1000 in stock which he sells for \$1500, B should have a lien on the \$1500 for \$750, that is for the \$500 in which he had an interest, and on the profit fairly attributable to that \$500, namely one half of the whole profit, or \$250.<sup>27</sup> Of course, no matter how large the profit arising from the investment in the stock, the claimant cannot, on the lien theory, get more than \$1000, the amount originally contributed by him. On the constructive trust theory he is entitled to one fourth of the proceeds of the stock, for he has contributed one fourth of the money with which it was purchased.

The new additions made by the wrongdoer out of his own funds may sometimes, however, be regarded as a restoration of the money of the claimant. If the wrongdoer is insolvent, and such appro-

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<sup>27</sup> It is perhaps arguable that the claimant should be allowed a lien for the amount of the lowest balance plus the whole profit. But if, to put an extreme case, after the wrongdoer has mingled \$1000 of his own with \$1000 of the claimant's and has dissipated all but \$1, and that \$1 is mingled with \$1000 of the wrongdoer's own money, and the \$1001 is invested in stock which doubles in value, it seems absurd to give the claimant a lien for \$1000. If the \$1 had not been a part of the purchase price of the stock, the claimant would have had no interest in the stock. The use of the \$1 should not entitle him to almost half the value of the stock. It might be said that the balance of the fund in which the claimant had an interest must substantially contribute to the earning of the profit. But such a rule would be too indefinite for application. To give him a lien to the extent of the balance of the fund into which his money went plus the part of the profit attributable to that balance seems both fair and easy of application. In the case suggested above he should be given a lien on the stock for \$2.

In *City of Lincoln v. Morrison*, 64 Neb. 822 (1902), a part of the commingled fund was used in buying certain state warrants, a large part of the purchase price being borrowed on the security of the warrants. The warrants were sold at a profit. It was held that the whole amount of the proceeds, which was less than the amount originally contributed by the claimant, could be reached by him. This does not seem opposed to what has been said in the preceding paragraph; for the profit really was earned wholly with the part of the commingled fund. It is like a case of a purchase of stock on a margin. As to how far profits arising from transactions partly for cash and partly on credit may be the product of the credit and not of the cash, see *Kyle v. Barnett*, 17 Ala. 306 (1850).



priation is a preference, it can give the claimant no right to take a larger sum from the fund than he could have taken before the appropriation.<sup>28</sup> If the wrongdoer actually intends to make an appropriation to the claimant's use, and if such an appropriation is not a preference, then the claimant's rights are the same as though the amount so restored had never been withdrawn.<sup>29</sup> The intent to restore may be shown, not merely by direct evidence, but by circumstances. Thus, where the wrongdoer deposits in an account the money of several claimants, and none of his own, and draws out a part and then makes a deposit in that account from his own funds, an intent to make restoration may fairly be inferred, and if the restoration when made is not a fraudulent preference, the claimants cannot be prevented from taking the money so deposited.<sup>30</sup> But suppose no intent to restore is shown either directly or by inference. Should the law impose a charge on the fund for more than the balance, or the product of the balance, of the fund into which the claimant's money went? It would seem not. The wrongdoer owes a duty to the claimant to make reparation. But after the whole of the commingled fund has been dissipated, the duty is a merely personal one and does not attach to any particular assets, for it is settled by the great weight of authority that the claimant has no charge on the general assets of the wrongdoer.<sup>31</sup>

<sup>28</sup> *Clark v. Rogers*, 183 Fed. 518 (1910); *Hewitt v. Hayes*, 205 Mass. 356 (1910).

As to how far it is a preference for a trustee on the eve of bankruptcy to make good the trust money, see *Ex parte Stubbins*, 17 Ch. D. 58 (1881); *Ex parte Taylor*, 18 Q. B. D. 295 (1886); *Sharp v. Jackson*, [1899] A. C. 419 (affirming *New v. Hunting*, [1897] 2 Q. B. 19); and, for the rule under the U. S. Bankruptcy Act, *Clark v. Rogers*, *supra*.

<sup>29</sup> *Ex parte Kingston*, L. R. 6 Ch. App. 632 (1871); *State Savings Bank v. Thompson*, 128 Pac. 1120 (Kan. 1913); *Supreme Lodge v. Liberty Trust Co.*, 102 N. E. 96 (Mass. 1913); *Jeffray v. Towar*, 63 N. J. Eq. 530 (1902), p. 546; *Van Alen v. American Bank*, 52 N. Y. 1 (1873); *Baker v. N. Y. Bank*, 100 N. Y. 31 (1885); *United National Bank v. Weatherby*, 70 App. Div. (N. Y.) 279 (1902). Compare *Sharp v. Jackson*, [1899] A. C. 419 (affirming *New v. Hunting*, [1897] 2 Q. B. 19); *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231, p. 254. See *In re Northrup*, 152 Fed. 763 (1907).

If the wrongdoer mingles the funds of several persons with his own and withdraws more than his own and makes new deposits, and if the new deposits are intended as a restoration, the claimants will all share *pro rata*. *In re T. A. McIntyre & Co.*, 181 Fed. 960 (1910).

<sup>30</sup> *United National Bank v. Weatherby*, 70 App. Div. (N. Y.) 279 (1902).

<sup>31</sup> *Spokane County v. First Nat. Bank*, 68 Fed. 979 (1895); *Board of Commissioners v. Strawn*, 157 Fed. 49 (1907); *Empire State Surety Co. v. Carroll County*, 194 Fed. 593 (1912); *In re Larkin*, 202 Fed. 572 (1912); *Lowe v. Jones*, 192 Mass. 94

If the fund was commingled in a bank in one account in the name of the wrongdoer, and then was wholly withdrawn, there is no reason why the claimant should be able to get subsequent deposits unless the wrongdoer intended to make restoration; and, if there was still left a part of the commingled fund, there seems to be no reason why he should get more than the balance. It is held, therefore, that the mere deposit of new additions of the wrongdoer's own funds does not increase the claimant's rights.<sup>32</sup> It is still more clear that in cases of physical mingling, subsequent additions by the wrongdoer after a partial dissipation of the commingled fund, will not increase the amount to which the claimant is entitled.<sup>33</sup> If, however, the claimant's money was deposited in a special trust account, and the wrongdoer withdraws a part and then deposits his own funds, it may well be held that regardless of his intent, the new deposit shall be treated as a restoration. Here the wrongdoer has put the money where it ought to be. He may be said to have performed to that extent his duty of reparation, whether he intended to make reparation or not.<sup>34</sup>

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(1906); *Jaffe v. Weld*, 155 App. Div. (N. Y.) 110 (1913); and see cases cited in 19 HARV. L. REV. 522, note 2.

<sup>32</sup> *Mercantile Trust Co. v. St. Louis Ry. Co.*, 99 Fed. 485 (1900); *Bank of British N. A. v. Freights*, 137 Fed. 534 (1905), p. 538 (*semble*); *Board of Commissioners v. Strawn*, 157 Fed. 49 (1907); *American Can Co. v. Williams*, 178 Fed. 420 (1910); *In re Brown*, 193 Fed. 24 (1912) (affirmed *sub. nom.* *First Nat. Bank v. Littlefield*, 226 U. S. 110 (1912)); *In re M. E. Dunn & Co.*, 193 Fed. 212 (1912); *Powell v. Missouri Co.*, 99 Ark. 553 (1911); *Hewitt v. Hayes*, 205 Mass. 356 (1910); *Cole v. Cole*, 54 App. Div. (N. Y.) 37 (1900).

<sup>33</sup> *In re Mulligan*, 116 Fed. 715 (1902), p. 717 (*semble*); *Board of Commissioners v. Strawn*, 157 Fed. 49 (1907); *Covey v. Cannon*, 104 Ark. 550 (1912).

<sup>34</sup> A somewhat similar question has arisen when one who holds stock for another wrongfully disposes of it and later acquires similar stock. If the wrongdoer owed the duty to hold the particular shares, then unless the proceeds of those shares can be traced into the new shares, or unless it is shown that the wrongdoer intended to make a restoration (*Perkins v. Perkins*, 134 Mass. 441 (1883)), the claimant has no better right than the general creditors. *Frith v. Cartland*, 2 H. & M. 417 (1865), p. 422 (*semble*). But where the wrongdoer is a broker and has the right to dispose of the stock provided he keeps similar stock on hand and he does dispose of it without keeping similar stock on hand, it is held that the person wronged may reach similar stock subsequently acquired. By acquiring the new stock he has to that extent made reparation. *Gorman v. Littlefield*, 229 U. S. 19 (1913) (reversing *In re Brown*, 184 Fed. 454 (1911)); *In re A. O. Brown & Co.*, 171 Fed. 254 (1909). See *contra*, *In re T. A. McIntyre*, 181 Fed. 960 (1910); *In re A. O. Brown & Co.*, 183 Fed. 861 (1910); *In re Brown*, *supra*; *In re Ennis*, 187 Fed. 728 (1911). It is not altogether clear in *Gorman v. Littlefield*, *supra*, whether the court goes on the ground of a presumption that the wrongdoer intended



To sum up: If one person wrongfully mingles the money of another with his own, the person wronged has a right either to (1) an equitable lien on, or (2) a share of, the whole commingled fund or any traceable product of it.

(1) The equitable lien rests on the whole fund or its product, for the amount the claimant has contributed to it; the mere separation of the fund into parts by withdrawals which are preserved will not affect his interest; withdrawals which are dissipated will diminish his security, but, so long as the balance left does not fall below the amount contributed by him, will not diminish the amount he is entitled to take; if the balance falls below the amount of his contribution, and nothing more is added from other sources, he has a lien on the balance, or, if it is invested, on its product, for the amount of his contribution; additions made from other funds, unless treated as a restoration of the claimant's money, will increase the fund on which he has a lien, but not the amount he is entitled to take, which will be the lowest balance of the original commingled fund, or, if that balance and the subsequent additions are advantageously invested, the balance and the profit earned by it, up to the amount originally contributed by him.

(2) The extent of his share will depend on the proportion contributed by him; it will not be affected by the mere separation of the fund into parts by withdrawals which are preserved; any rise in value not resulting from new contributions will enure to his benefit, for the denominator of the fraction representing his interest will remain the same while the numerator will increase; any loss by withdrawals which are dissipated, or by a decline in value, will cause him a loss, for the denominator of the fraction will remain the same while the numerator will decrease; any new contributions of other funds, unless treated as a restoration of the claimant's money, will simply give him a smaller part of a larger whole.

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to restore, or on the ground that, since it was the wrongdoer's duty to restore, the person wronged has a claim to the newly acquired stock regardless of the wrongdoer's intent.

## PREDATORY PRICE CUTTING AS UNFAIR TRADE.

THE methods of the unfair trader are as many and various as the highly specialized ingenuity of a dishonest schemer can invent. The designation "unfair competition" or "unfair trade" seems to have been adopted as a convenient description of offences against commercial morals not included in trade mark infringement.

It was for many years assumed that unless a technical trade mark were violated, no relief could be had. It was soon demonstrated that the acceptance of any such rule opened the door to all manner of commercial knavery, and at an early day judges with consciences and a proper sense of sportsmanship began to decide cases in favor of the complainant which were in no sense trade mark cases, but where the defendant's conduct involved precisely the same wrong—the sale of one trader's goods as those of another—the result being accomplished by some ingenuous contrivance, the deceptive use of personal, geographical or descriptive names, imitated labels or form of package or in some of the infinity of ways which enable one trader to represent his goods as those of a competitor, whose reputation is better and whose trade he covets.<sup>1</sup> The digesters and text-

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<sup>1</sup> In *Perry v. Truefitt*, 6 Beav. 66 (1842), Lord Langdale said (p. 73): "I think that the principle on which both the courts of law and of equity proceed in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretense that they are the goods of another man; he cannot be permitted to practice such a deception nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are manufactured of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception and in order to attract to himself that course of trade, or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark."

In *Croft v. Day*, 7 Beav. 84 (1843), Lord Langdale said (p. 88): "It has been very correctly said that the principle in these cases is this—that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that



writers at first were puzzled to know where to classify such cases. The author of a text book on Trade Marks would devote a chapter to "Cases analogous to trade marks" and put them there. Finally, the term "unfair competition" was adopted (perhaps from the French *Concurrence Deloyale*) and has since been used to describe that class of wrongs where by artifice one trader's goods are sold as and for another's.<sup>2</sup> Probably the phrase "passing off" commonly used in England more correctly describes the wrong as we now understand it in this country than "unfair competition," but "unfair competition" is the preferable designation if it can be given the meaning that, as a part of the English language, it ought

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other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud."

(1845) *Coats v. Holbrook*, 2 Sandf. Ch. 586, R. Cox, Am. Trade Mark Cases, 20, where not only an imitated name was used, but a simulated mode of putting up goods including the peculiar spools and wrappers employed by the complainant. Vice-Chancellor Sandford said, (p. 594): "A man is not to sell the goods or manufactures of B. under the show or pretense that they are the goods or manufactures of A., who, by superior skill or industry, has established the reputation of his articles in the market. The law will permit no person to practice a deception of that kind, or to use the means which contribute to effect it. He had no right, and he will not be allowed, to use the names, letters, marks, and other symbols by which he may palm off upon buyers, as the manufacture of another, the article he is selling, and thereby attract to himself the patronage that without such deceptive use of such names, etc., would have inured to the benefit of that other person who first got up or was alone accustomed to use such names, marks, letters, or symbols."

(1857) *Williams v. Johnson*, 1 R. Cox, Am. Trade Mark Cases, 214, involved an imitation of the get-up of Williams' Yankee Shaving Soap. Woodruff, J., (p. 222): "It is so palpable as to admit of no reasonable doubt that the devices employed by the defendant were calculated and intended by him to secure the benefit of the reputation which the plaintiffs had acquired. He is in this respect entitled to no favor. The court, in considering the propriety of enjoining him pending the litigation, will not feel called upon to be zealous to aid him by refined distinctions, so that he may evade the letter and violate the scope and spirit of the adjudged cases."

<sup>2</sup> *Powell v. Birmingham Vinegar Brewery Co.*, [1894] 3 Ch. Div. 449, [1894] 3 Ch. Div. 462, [1896] 2 Ch. 54, 64, [1897] A. C. 710; *Dyment v. Lewis*, 144 Iowa 509 (1909), 123 N. W. 244, 245, 26 L. R. A. N. S. 73 (note); *Reddaway v. Banham*, [1896] A. C. 199; *Bates Mfg. Co. v. Bates Numbering Machine Co.*, 172 Fed. 892, 894 (1909); *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 520, 42 Pac. 142, 145 (1895); *Manitowoc Pea Packing Co. v. Numsen*, 35 C. C. A. 267, 93 Fed. 196, 197 (1899); *Shaver v. Heller & Merz*, 108 Fed. 821 (1901); *Garrett v. Garrett*, 78 Fed. 472 (1896); *Pillsbury v. Pillsbury-Washburn Flour Mills Co.*, 64 Fed. 841 (1894); *Hires v. Consumers' Co.*, 100 Fed. 809 (1900); *R. J. Reynolds Tobacco Co. v. Allen*, 151 Fed. 819 (1907); *Sterling Remedy Co. v. Spermine Co.*, 112 Fed. 1000 (1901); *Scriven v. North*, 134 Fed. 366 (1904); *Walter Baker & Co., Ltd., v. Slack*, 130 Fed. 514 (1904).

to have — that it includes not alone “passing off” but any conduct on the part of one trader which tends unnecessarily to injure another in his business. Universally in this country, until very recently, “unfair competition” was assumed to involve the element of actual or constructive fraud — a misrepresentation, express or implied, concerning the commercial origin of goods. This was so whether the false representation in that respect affected a single trader or a group, for in either event there was deception of the public coupled with damage to the business good will of the individual or group. The wrong may consist, as it does in the common case, where an article is falsely represented to be the product of an individual whose goods are sought after because of public belief in their excellence, in diverting custom to the pirate which would otherwise have gone to the reputable producer. The same wrong less centralized may also be perpetrated, where the false representation concerns geographical origin, by the false use of a reputable place name.

It is well recognized at the present time, though there are some earlier cases to the contrary,<sup>3</sup> that the manufacturer of a product in a certain district has a right as against a person not manufacturing in that district to the use of the name of the district. All or any rightfully and truthfully using the place name may sue.<sup>4</sup> One of a

<sup>3</sup> *New York & R. Cement Co. v. Coplay Cement Co.*, 44 Fed. 277 (1890); 45 Fed. 212 (1891).

<sup>4</sup> *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 86 Fed. 608 (1898); *Newman v. Alvord*, 51 N. Y. 189 (1872); *California Fruit Cannery Ass'n v. Myer*, 104 Fed. 82 (1899); *Key West Cigar Mfg. Ass'n v. Rosenbloom*, 171 Fed. 296 (1909); *El Modelo v. Gato*, 25 Fla. 886, 7 So. Rep. 23, 6 L. R. A. 823 (1890); *Keller v. Goodrich*, 117 Ind. 556, 19 N. E. 196 (1888); *Blackwell v. Dibrell*, 3 Hughes 151, F. C. 1475 (1878); *Anheuser-Busch v. Piza*, 24 Fed. 149 (1885); *Southern White Lead Co. v. Coit*, 39 Fed. 492 (1888); *Southern White Lead Co. v. Cary*, 25 Fed. 125 (1885); *Pike v. Cleveland Stone Co.*, 35 Fed. 896 (1888); *Northcutt v. Turney*, 101 Ky. 314, 41 S. W. 21 (1897); *Gage-Downs Co. v. Featherbone Co.*, 88 Fed. 213; *Elgin Nat. Watch Co. v. Loveland*, 132 Fed. 41 (1904); *Collinsplatt v. Finlayson*, 88 Fed. 693 (1898); *Braham v. Beachim*, L. R. 7 Ch. D. 848 (1878); *Southern v. Reynolds*, 12 L. T. N. S. 75 (1865); *Dunnachie v. Young*, Scottish Session Cases, 4th Series, vol. 10, p. 874 (1883); *Lochgelly Iron & Coal Co. v. Christie*, Scottish Session Cases, 4th Series, vol. 6, p. 482 (1879); *The Canterbury Frozen Meat & Dairy Produce Co., Ltd., v. The Christchurch Meat Co.*, 8 New Zealand Law Rep. 49 (1889).

For the Continental law on this subject see Kohler “das Recht des Markenschutzes,” pp. 108–118.

The wine producers in the vicinity of Rheims and Epernay have been diligent and successful in enjoining vineyard proprietors outside of the Champagne district from the geographically false use of the word “Champagne.” (*Walbaum v. X.*, 5 Propriété In-



number of truthful users of a personal name<sup>5</sup> has a right to stop a person from the false use of the same name and to be compensated in damages proportionately to his interest in the subject matter.<sup>6</sup> A person who is rightfully using the generic name of a patented product has a right to stop a person falsely using the name or using the name in connection with a different product.<sup>7</sup> This probably applies as well to the use of generic names of unpatented articles, that is to say, the manufacturer of an article under a name indicative of a reputable class of goods may stop persons from using the name on goods not of the class where the false representation is sufficiently specific to involve origin as well as class.<sup>8</sup>

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dustrielle 19; *Syndicate of Wine Merchants v. Ackerman*, 19 *Journal du droit International Privé* 1068; *Chapin v. The Syndicate of Dealers in Champagne*, 20 *Journal du droit International Privé* 406, decision of Landgericht de Strasbourg, 19 Feb. 1896, 12 *La Propriété Industrielle* 78.) This controversy culminated in the delimitation decree of Dec. 7, 1909, and the riots which followed.

The brewers at Pilsen succeeded in stopping brewers outside of Pilsen branding their beer "Pilsener," 20 *Patent Blatt*, No. 12, p. 104.

<sup>5</sup> *Pinet v. Pinet*, 14 R. P. C. 933 (1897); *Smail v. Sanders*, 118 Ind. 105, 20 N. E. 296 (1889); *DeYoungs v. Jung*, 25 N. Y. Supp. 479 (1893), 27 N. Y. Supp. 370 (1894); *Barber v. Manico*, 10 R. P. C. 93 (1893); *Clark Thread Co. v. Armitage*, 67 Fed. 896 (1895), 74 Fed. 936 (1896); *Wm. Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.*, 11 Fed. 495 (1882).

<sup>6</sup> *Wm. Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.*, 11 Fed. 495, 500 (1882).

<sup>7</sup> *Singer Co. v. Hipple*, 109 Fed. 152 (1901); *Janney v. Pan-coast Ventilator Co.*, 128 Fed. 121 (1904).

<sup>8</sup> In *Jaeger v. Le Boutillier*, 24 N. Y. Supp. 890 (1893), it was held that the complainant had no exclusive right to the name "Jaeger" because indicative of a system, but that the name could truthfully be applied only to woolen garments. Defendant described as "Jaeger," garments made partly of cotton. Held, that notwithstanding the lack of exclusive right in the name complainant could sue. *Gildersleeve, J.* (p. 901): "The plaintiff's right to use the name 'Jaeger' as designating underwear made in accordance with the Jaeger system, is so qualifiedly exclusive that its right to protection of its use against infringement by others rests upon the ground that such use by them is an untrue or deceptive representation. The application of the name 'Jaeger' or 'Jaeger System' to underwear containing an admixture of cotton is an untrue and deceptive representation, and, as against such a use, the plaintiff is entitled to relief. It is a false representation of fact, which tends to confuse the identity of the defendant's goods, not made after the Jaeger system, with the goods of the plaintiff, made in accordance with that system, and creates a dishonest competition, detrimental to the plaintiff. One of the uses by the defendant of the name 'Jaeger' to designate underwear containing an admixture of cotton must be held to be for the purpose of taking advantage of the reputation the all-wool Jaeger goods have acquired, and of the Jaeger name, as applied thereto. The application of the name 'Jaeger' by the defendant to goods part cotton tends to deceive the purchasers and users of plaintiff's goods, and actually mislead them into buying the goods containing cotton sold by defendant, in the belief that

On the same principle members of societies have a right to stop the use of the name of the society or its emblem or label by persons not members and not entitled to use these various things.<sup>9</sup>

These cases all proceed upon the theory that a community mark represents the reputation or good will of those making up the community or group, that anyone of them has a sufficient interest to stop a wrongful use by an outsider,<sup>10</sup> and that it is wrong by misrepresentation to steal away the customers of an individual trader or of a group of traders.

A trade mark is not a name or device in the abstract, but is a means applied to goods to indicate their commercial origin. It does not exist as an extrinsic thing.<sup>11</sup> When applied to merchandise, a

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they are the goods dealt in by the plaintiff. Moreover, since the goods containing an admixture of cotton can be profitably sold at a less price than the all-wool goods, the tendency must be to unfairly divert custom from the plaintiff to the defendant." *Jaffe v. Evans*, 70 N. Y. App. Div. 186 (1902); *Anheuser-Busch v. Fred Miller Brew. Co.*, 87 Fed. 864 (1898).

<sup>9</sup> *Carson v. Ury*, 39 Fed. 777 (1889); *Society of Accountants v. Corporation of Accountants*, Scottish Session Cases, 4 Ser., vol. 20, p. 750 (1893); *Society of Accountants & Auditors v. Goodway* (1907), 1 Ch. 489, 76 L. J. Ch. 384, 96 L. T. N. S. 326, 23 T. L. R. 286, 24 R. P. C. 159.

<sup>10</sup> In *Wm. Rogers Mfg. Co. v. Rogers & Spurr Co.*, 11 Fed. 495, 500 (1882), Judge Lowell said: "It is further argued that the Rogerses are so many that the court cannot find an intent to appropriate the reputation of one of them more than another; and that, if any suit will lie, it must be by all those who use any trade mark whose distinctive feature is the name 'Rogers.' I believe it to be true that the Greenfield Rogerses did not inquire, nor did the defendants care, whose reputation they were making available; but I am of opinion that any one of those who rightly uses the name may enjoin its interfering use by others."

<sup>11</sup> In *Rey v. Lecouturier*, 25 R. P. C. 268 (1908) (House of Lords), Lord Shaw said: "In short the business of Chartreuse liqueur, as such is carried on by them (the monks), and the English trade marks are therefore trade marks in respect of a thing, the business in which is not and cannot be conducted by the appellants. The trade marks are in the latter; the business in the monks. My Lords, such severance is not legally possible."

*Weston v. Ketcham*, 51 How. Pr. 455, Cox Man. 487 (1876), Sedgwick, J.: "There is no such thing as a trade mark 'in gross' to use that term by analogy. It must be appendant to some particular business in which it is actually used upon, or in regard to specific articles." *Mayer v. Virginia-Carolina Co.*, 156 O. G. 539, 35 App. D. C. 425, [1910] C. D. 399, 4 Pomeroy Eq. (1905), sec. 1405, n. 10; *Bozon v. Farlow*, 1 Mer. 459 (1816); *Baxter v. Connolly*, 1 Jac. & W. 576 (1820); *Coslake v. Till*, 1 Russ. 376 (1826); *Metropolitan Bank v. St. Louis Dispatch*, 149 U. S. 436 (1893); *Bulte v. Igleheart*, 137 Fed. 492 (1905); *Allan on Good Will*, p. 12; *Eiseman v. Schiffer*, 157 Fed. 473, 476 (1907); *Rey v. Lecouturier*, 25 R. P. C. 265, 291 (1908); *Robertson v. Quiddington*, 28 Beav. 529 (1860); *Musselman's Appeal*, 62 Pa. St. 81 (1869); *Commonwealth v. Ky. Distilleries Co.*, 116 S. W. 766 (1909); *Metropolitan Nat.*



trade mark is of value exactly as the information it conveys or implies is of value. If it is valuable that the public should know that a certain article is produced by a certain trader, then the trade mark or other thing by which that information is conveyed is of equal value. The value, however, is not in the trade mark but in the mark plus the information it conveys concerning the origin of the merchandise to which it is applied — the trade mark as symbolizing a business good will or reputation,<sup>12</sup> and it is the good will or reputation which is the property not the symbol as a separate thing.<sup>13</sup>

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*Bank v. St. Louis Dispatch Co.*, 36 Fed. 722 (1888); *People v. Roberts*, 159 N. Y. 70, 76, 53 N. E. 685 (1899); *MacMahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, 113 Fed. 468, 474 (1901); *Dietz v. Horton*, 170 Fed. 865, 871 (1909); *Williams v. Farrand*, 88 Mich. 473, 50 N. W. 446, 448 (1891); *Sebastian on Trade Marks*, 4 ed., 9; *Avery v. Meikle*, 81 Ky. 73 (1883); *Grocers' Journal Co. v. Midland Pub. Co.*, 127 Mo. App. 356, 105 S. W. 310, 312 (1907); *MacMillan v. Erhmann*, 21 R. P. C. 357, 361, affirmed (C. A.) 21 R. P. C. 647 (1904); *Spiegel v. Zuckerman*, 175 Fed. 978, 984 (1910); *Messer v. The Fadettes*, 168 Mass. 140, 46 N. E. 407 (1897); *Pinto v. Badman*, 8 R. P. C. 181, 192 (1891); *Kidd v. Johnson*, 100 U. S. 617 (1879); *Thorneloe v. Hill*, 8 Reports 718, 11 R. P. C. 61, 71 (1894); *Dixon v. Guggenheim*; 2 Brews. 321, R. Cox, 559, 576 (1870); *McVeagh v. Valencia Cigar Factory*, 32 O. G. 1124, P. & S. 970, 973 (1885).

<sup>12</sup> *State v. Bishop*, 128 Mo. 373, 31 S. W. Rep. 9, 29 L. R. A. 200 (1895), *Burgess, J.*: "Abstractly and apart from its application and use, a trade mark has no recognized ownership. Its value is in its employment in marking the goods upon which it is placed. This gives it the character of property. It is then a symbol of reputation or good will." *Ball v. Broadway Bazaar*, 194 N. Y. 429, 87 N. E. 674, 676 (1909); *Commonwealth v. Ky. Distilleries Co. (Ky.)*, 116 S. W. 766 (1909); *Carroll v. McIlvaine*, 171 Fed. 125, 128 (1909); *Royal Co. v. Raymond*, 70 Fed. 376, 380 (1895).

<sup>13</sup> While there are a number of cases which hold that the right to a trade mark is property, a little examination will demonstrate that the notion is unsound, and that the true theory is that there is no such thing as *property* in a trade mark. The property is in the business good will which the trade mark symbolizes, not in the trade mark itself. *Reddaway v. Banham*, [1896] A. C. 199, 209, 210, 13 R. P. C. 218, 228.

Lord Herschell: "The word 'property' has been sometimes applied to what has been termed a Trade Mark at common law. I doubt myself whether it is accurate to speak of there being property in such a Trade Mark, though, no doubt, some of the rights which are incident to property may attach to it."

*Chadwick v. Covell*, 151 Mass. 190, 194, 23 N. E. 1068, 1069, 6 L. R. A. 389 (1890).

Holmes, C. J.: "Undoubtedly, the exclusive right to use a certain collocation of words or signs to designate a certain class of goods may have a considerable money value as an advertisement, but the fact that a right would have a money value, if it existed, is not a conclusive reason for recognizing the right. The exclusive right to particular combinations of words or figures for purposes not less useful than advertising — for poetry, or the communication of truths discovered for the first time by the

It seems as if good will in this connection is more a sentiment than the thing we commonly run across in judicial opinions. Good will, to define it inexactly, is the friendliness which a consumer may have toward a particular trader's goods. It is that friendliness which induces him to buy one product rather than another. In order that his inclination toward a particular article may be exercised it is necessary that he be furnished the means of distinguishing the thing he wants to buy from others of a similar kind. Therefore, the trade mark, or whatever it is that enables the purchaser to pick out from among others the thing that he wants, is with him, at least, the

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writer, for art or mechanical design — has needed statutes to call it into being, and is narrowly limited in time. When the common law developed the doctrine of trade marks and trade names, it was not creating a property in advertisements more absolute than it would have allowed the author of *Paradise Lost*, but the meaning was to prevent one man from palming off his goods as another's, from getting another's business or injuring his reputation by unfair means, and, perhaps, from defrauding the public. It is true that some judges, noticeably Lord Westbury, have preferred to rest the protection to trade marks on the notion of property, rather than of fraud; but it is plain, upon reading his judgments, that he means no more than that the deception which equity will prevent, need not have been intended, — as when a man ignorantly adopts a trade mark already in use, — and that within certain limits a trade mark may be sold, which nobody denies. *Hall v. Barrows*, 4 De Gex, J. & S. 150, 158; *Leather Cloth Co. v. American Leather Cloth Co.*, Id. 137. The limitations are clearly marked by the language of Lord Cranworth and Lord Kingsdown in the latter case on appeal to the House of Lords. 11 H. L. Cas. 523, 534, 538. See also *Manufacturing Co. v. Loog*, L. R. 8 App. Cas. 15, 29, *et seq.*; *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 514, 519; *Ainsworth v. Walmsley*, L. R. 1 Eq. 518, 525; *Collins Co. v. Brown*, 3 Kay & J. 423, 426. At least as strict a rule is to be drawn from *Pub. St. c. 76, § 1*; *Gilman v. Hunnewell*, 122 Mass. 139, 148."

*Collins Co. v. Brown*, 3 K. & J. 423, 69 Full Reprint, 1174 (1857). W. Page Wood, V. C.: "It is now settled law that there is no property whatever in a trade mark, but that a person may acquire a right of using a particular mark for articles which he has manufactured, so that he may be able to prevent any other person from using it, because the mark denotes that articles so marked were manufactured by a certain person; and no one else can have a right to put the same mark on his goods, and thus to represent them to have been manufactured by the person who originally used that particular mark. That would be a fraud upon the person who first used the mark in the market where his goods are sold."

See Lord Justice James' remarks in *Singer Co. v. Loog*, L. R. 18 Ch. Div. 412, 413 (1880); Judge Loring's observations in *Cohen v. Nagle*, 190 Mass. 4, 76 N. E. 276, 282 (1906), and Chief Justice Knowlton's in *Fox v. Glynn*, 191 Mass. 344, 78 N. E. 89, 91 (1906). See also *Canada Publishing Co. v. Gage*, 3 Can. Com. Law Rep. 119, 129; *Turton v. Turton*, 42 L. R. Ch. Div. 128, 61 L. T. N. S. 571, 576 (1889); *Lee v. Haley*, 22 L. T. N. S. 251 (1869); *Powell v. Birmingham*, 13 R. P. C. 235, 250 (1896); *Walton v. Crowley*, 3 Blatch. 440, R. Cox, 166, 173 (1856); *Carroll v. McIlvaine*, 171 Fed. 125, 129 (1909).



embodiment of the friendliness or good will which he has toward that product. The probability of successive purchases is what the courts call good will.

The theory of all the cases enjoining trade mark infringement, as well as those restraining the diversion of the business of one trader to another by artifice or contrivance, by means of which a false representation concerning the commercial origin of merchandise is made, is that every trader is entitled to the first reward of his honesty, skill or enterprise; that if his product has a reputation and is preferred by purchasers to the goods of others, he has a right to every benefit which ensues from that fact. He has the right to take advantage of this public preference for his goods, and by a trade mark or otherwise to announce to the public the fact of their origin with him and thus visibly to symbolize and perpetuate his reputation.<sup>14</sup> In short, that the good will which he has created belongs

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<sup>14</sup> In *McLean v. Fleming*, 96 U. S. 245, 251 (1877), Mr. Justice Clifford said: "Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer. . . . Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good will of his trade, and in the labels or trade mark which he adopted to enlarge and perpetuate it. . . . A trade mark may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells to distinguish the same from those manufactured or sold by another, to the end that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity."

In *Partridge v. Menck*, 2 Sandf. Ch. 622, 2 Barb. Ch. 101, 1 How. App. Cas. 558, R. Cox, 72, 77 (1848), the Chancellor said: "The court proceeds upon the ground that the complainant has a valuable interest in the good will of his trade or business. And that having appropriated to himself a particular label or sign, or trade mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, or by his authority, or that he carries on business at a particular place, he is entitled to protection against a defendant who attempts to pirate upon the good will of the complainant's friends or customers, or the patrons of his trade or business, by sailing under his flag without his authority or consent."

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. S. C. 599, R. Cox, 87, 91 (1849), Judge Duer said: "Every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells by a peculiar mark or device in order that they may be known as his in the market for which he intends them, and that he may thus secure the profits that their superior repute, as his, may be the means of gaining. His trade mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. To protect him, therefore, in the exclusive use of the

to him alone, and that attempts by others to divert it to themselves are wrongful.

It would seem as if the damage to good will rather than deception of the public is really the important thing, which induces the courts to interfere in trade mark infringement and passing off cases. Whether or not the defendant's conduct is calculated to deceive the public into the belief that his goods are the complainant's is, of course, a material inquiry, because if this false representation is being made, the complainant is certainly damaged for he is in danger of having his customers decoyed away from him by the defendant's misrepresentations and "thus the custom and advantages to which the enterprise and skill of the first appropriator have given him a just right, are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of an-

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mark that he appropriates is not only the evident duty of a court, as an act of justice, but the interests of the public, as well as of the individual, require that the necessary protection shall be given. It is a mistake to suppose that this necessary protection can operate as an injurious restraint upon the freedom of trade. Its direct tendency is to produce and encourage a competition, by which the interests of the public are sure to be promoted; a competition that stimulated effort and leads to excellence, from the certainty of an adequate reward."

Judge Thompson said in *Skinner v. Oakes*, 10 Mo. App. 45, *Price & Steuart's Trade Mark Cases*, 459, 468 (1881): "The courts have proceeded upon the twofold principle that the public have a right to know that the goods which bear the signature or mark of a particular manufacturer or vendor are, in fact, the goods of such manufacturer or vendor, and that the manufacturer or vendor of such goods has the right to any advantage which may accrue to him from the public knowing that fact."

In *Dennison v. Thomas*, 94 Fed. 651, 657 (1899), Judge Bradford said: "The function of a trade mark is to indicate to the public the origin, manufacture, or ownership of the articles to which it is applied, and thereby secure to its owner all benefit resulting from his identification by the public with the articles bearing it."

In *Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, 57 Barb. 526, R. Cox, 599, 621 (1871) Judge James said: "The principle which underlies this doctrine is that he who by his skill, industry or enterprise has produced or brought into market or service some commodity or article of use, convenience, utility, or accommodation, and affixed to it a name, mark, device, or symbol which serves to designate it as his, is entitled to be protected in that designation from encroachment, so that he may have the benefit of his skill, industry, or enterprise, and the public be protected from the fraud of imitators."

In *Williams v. Brooks*, 50 Conn. 278, P. & S. 654 (1882), Judge Pardee said (p. 659): "The purpose to be effected by this proceeding is not primarily to protect the consumer but to secure to the plaintiffs the profit to be derived from sale of hair pins of their manufacture to all who may desire and intend to purchase them."



other.”<sup>15</sup> But it would seem that it is the abstraction for another’s use of the custom and advantages to which the enterprise and skill of the first appropriator have given him a just right that gives the right of action rather than the means by which this is accomplished. Public deception cannot be an indispensable element. Deception of the public without more is not a ground for private action. “Somebody,” said Lord Justice James, “has a right to say, ‘You must not use a name, whether fictitious or real, or a description, whether true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, and therefore deprive me by a fraudulent misstatement of yours from the profits of the business which would otherwise come to me.’ That is the sole principle on which the court interferes. The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything.”<sup>16</sup> Of course fraud does not necessarily mean intentional fraud. The element of actual fraud has long ceased to be important. While it has frequently been said that fraud is the essence of the offence, this can mean no more than constructive fraud. Here, as elsewhere, men are presumed to intend the natural consequences of their acts. “The act, however innocent, is considered constructively fraudulent if the result would tend to unfair trade, to confusion of goods and to interference with the rights of another.”<sup>17</sup>

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<sup>15</sup> *Mr. Justice Strong in Canal Co. v. Clark*, 13 Wall. (U. S.) 311, 322 (1871).

<sup>16</sup> *Levy v. Walker*, L. R. 10 Ch. Div. 436, 39 L. T. N. S. 656, 657 (1879).

“The fraud upon the public is no ground for the plaintiffs coming into this court.” *Lord Eldon in Webster v. Webster*, 3 Swanst. 493, 36 Full Reprint, 949 (1791).

<sup>17</sup> *Manitowoc Co. v. Numsen*, 93 Fed. 196 (1899). See also the comments of Lord Halsbury in *Cellular Clothing Co. v. Maxton and Murray*, 16 R. P. C. 397, 404 (1899): “The only observation that I wish to make upon that part of the argument is that it seemed to be assumed that a fraudulent intention is necessary on the part of the person who was using a name in selling his goods in such a way as to lead people to believe that they were the goods of another person. That seems to me to be inconsistent with a decision given something like sixty years ago by Lord Cottenham, who goes out of his way to say very emphatically that that is not at all necessary in order to constitute a right to claim protection against the unlawful use of words or things — I say things, because it is to be observed that not only words but things, such as the nature of the wrapper, the mode in which the goods are made up, and so on, may go to make up a false representation; but it is not necessary to establish fraudulent intention in order to claim the intervention of the court. Lord Cottenham says in that case (*Millington v. Fox*, 3 Mylne & Craig, p. 352): ‘I see no reason to believe that there has in this case

That a trader cannot be legally injured in his business good will, except by stealing his customers away from him by deceit, cannot be the law. It is the damage, not the manner of it, which is important.

If deception of the public coupled with damage to the business of a particular trader or group of traders is actionable, and deception of the public without damage to such business is not ac-

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been a fraudulent use of the plaintiff's marks. It is positively denied by the answer, and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs as a company manufacturing steel; for, although there is no evidence to show that the terms "Crowley" and "Crowley Millington" were merely technical terms, yet there is sufficient to show that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names, and therefore I stated that the case is so made out as to entitle plaintiffs to have the injunction made perpetual.' That, my Lords, I believe to be the law. It was the law then, and it has not been qualified or altered by the fact that the Trade Marks Act has since been passed, which gives a feasible and perfectly facile mode of remedy in cases in which trade marks apply." See also *Gorham Mfg. Co. v. Schmidt*, 196 Fed. 955 (1912); *Gorham Mfg. Co. v. Di Salvo*, 196 Fed. 956 (1912); *Singer Co. v. Hipple*, 109 Fed. 152 (1901); *Estes v. Williams*, 21 Fed. 189 (1884); *Jaffe v. Evans*, 70 N. Y. App. Div. 190 (1902); *Janney v. Pancoast Co.*, 128 Fed. 121 (1904); *Saxlehner v. Siegel-Cooper Co.*, 179 U. S. 42 (1900); *William Rogers v. Rogers & Spurr Co.*, 11 Fed. 495 (1882); *Shaver v. Shaver*, 54 Iowa, 208, 6 N. W. 188 (1880); *Brown Chemical Co. v. Frederick Stearns*, 37 Fed. 360 (1889); *McAndrew v. Bassett*, 10 Jur. N. S. 550 (1864); *Fraser v. Nethersole*, 4 Kyshe, 273 (1887); *Smith v. Carron Co.*, 13 R. P. C. 111 (1896); *Powell v. Birmingham Vinegar Co.*, 13 R. P. C. 241, 256 (1896); *Millington v. Fox*, 3 My. & Cr. 338 (1838); *Rose v. McLean Co.*, 24 Ont. App. 248 (1897); *Slazenger v. Pigott*, 12 R. P. C. 442 (1895); *Reddaway v. Bentham*, 9 R. P. C. 507 (1892); *Re Christiansen's T. M.*, 3 R. P. C. 64 (1886); *Dale v. Smithson*, 12 Abb. Pr. 237, R. Cox, 282 (1861); *Phalon v. Wright*, 5 Phila. 464, R. Cox, 307, 308 (1864); *Davis v. Kendall*, 2 R. I. 566, R. Cox, 112, 114 (1850); *Barrows v. Knight*, 6 R. I. 434, R. Cox, 238, 242 (1860); *Sheppard v. Stuart*, 13 Phil. 117, P. & S. 193 (1879); *Hine v. Lart*, 10 Jur. 106 (1846); *Dixon Co. v. Guggenheim*, 7 Phila. 408 (1870); *Royal Co. v. Jenkins*, P. & S. 309, 311 (1880); *Cartier v. Carlile*, 31 Beav. 292 (1862); *Dreydoppel v. Young*, 14 Phila. 226, P. & S. 423, 425 (1880); *Hier v. Abrahams*, 82 N. Y. 519, P. & S. 438 (1880); *Am. Grocer v. Grocer*, 25 Hun 398, P. & S. 546, 551 (1881); *Coleman v. Crump*, 70 N. Y. 578 (1877); *Williams v. Brooks*, 50 Conn. 278, P. & S. 654, 658 (1882); *Tobacco Co. v. Commerce*, 45 N. J. L. 18, P. & S. 705, 707 (1882); *Coffeen v. Brunton*, 4 McLean 516, R. Cox, 82 (1849); *Dale v. Smithson*, 12 Abb. Pr. 237 (1861); *Ainsworth v. Walmsley*, L. R. 1 Eq. 518 (1866); *Lorillard v. Wight*, 15 Fed. 383, P. & S. 739, 742; *Coats v. Holbrook*, 2 Sandf. Ch. 586, R. Cox, 20, 31 (1845); *Amoskeag Co. v. Spear*, 2 Sandf. s. c. 599, R. Cox, 87, 94 (1849); *Royal Co. v. Sherrell*, 93 N. Y. 331, P. & S. 853 (1883); *Liggett v. Hynes*, 20 Fed. 883, P. & S. 898, 902 (1884); *Landreth v. Landreth*, 22 Fed. 41, P. & S. 943, 947 (1884); *McCann v. Anthony*, 3 West Rep. 436, P. & S. 1054, 1061 (1886).



tionable,<sup>18</sup> then it would seem as if it is the element of damage to business that is important rather than the deception of the public; that depriving him of his customers by deceiving them is only one method of unnecessarily injuring a man in his business, and that other conduct on the part of one trader not involving deception of the public, if it results in unnecessary damage to the business of another, ought as well to be capable of redress. It would seem as if relief should depend, not on the element of public deception, but upon the answer to the query, — is business or good will being diverted from one who has created it, to his injury and to the benefit of the parasite? If it is being taken away, whether by

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<sup>18</sup> In *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281 (1900), (Circuit Court of Appeals of the Sixth Circuit, composed of Judges Taft, Lurton, and Day), the complainant, who was the only manufacturer of washboards made out of aluminum, sought to restrain the defendant from calling a board not made of aluminum an "aluminum board." The injunction was denied. Judge Day in the course of his opinion observed: "We do not find it anywhere averred that the defendant, by means of its imitation of complainant's trade mark, is palming off its goods on the public as and for the goods of complainant. The bill is not predicated upon that theory. It undertakes to make a case, not because the defendant is selling its goods as and for the goods of complainant, but because it is the manufacturer of a genuine aluminum board, and the defendant is deceiving the public by selling to it a board not made of aluminum, although falsely branded as such, being in fact a board made of zinc material; that is to say, the theory of the case seems to be that complainant, manufacturing a genuine aluminum board, has a right to enjoin others from branding any board 'Aluminum' not so in fact, although there is no attempt on the part of such wrongdoer to impose upon the public the belief that the goods thus manufactured are the goods of complainant. We are not referred to any case going to the length required to support such a bill."

*Borden's Condensed Milk Co. v. Horlicks Malted Milk Co.*, 206 Fed. 949.

*Borden's Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510, 514.

*Saxlehner v. Wagner*, 216 U. S. 375 (1910), was a case where it was sought by the proprietor of the Hunyadi Janos water to restrain the use of the name "Hunyadi" by the defendant on an artificial water. Mr. Justice Holmes said: "The real intent of the plaintiff's bill, it seems to us, is to extend the monopoly of such trade mark or trade name as she may have to a monopoly of her type of bitter water, by preventing manufacturers from telling the public in a way that will be understood, what they are copying and trying to sell. But the plaintiff has no patent for the water, and the defendants have a right to reproduce it as nearly as they can. They have a right to tell the public what they are doing and to get whatever share they can in the popularity of the water by advertising that they are trying to make the same article, and think that they succeed. If they do not convey, but on the contrary exclude, the notion that they are selling the plaintiff's goods, it is a strong proposition that when the article has a well-known name, they have not the right to explain by that name what they imitate. By doing so, they are not trying to get the good will of the name, but the good will of the goods."

fraud or otherwise, so that its value to its creator is sensibly diminished, why should he not have redress? Why make sneak thievery a crime and legalize highway robbery?

Take a common case of price cutting. An article of recognized merit has an established retail price fixed by the producer of it. It is extensively advertised. The price is known. It is a reasonable price or at least is believed to be by the public or it would not be paid. Under modern trade and advertising conditions articles must be nationally distributed. They must be in the hands of as many retail dealers as possible. The effect of an advertisement of a particular article is not lasting. It creates an immediate impulse to buy or it is of little use. For the advertiser to have a return on his advertising expenditure, the potential purchaser must be able to obey the impulse while he has it. It must not be permitted to wear off. The price of the article must be stated so that the reader of the advertisement may know that it is within his means but, most important of all, while he is in the notion he must be able to buy the thing at the time he wants it at the first shop he sees. He must be made to feel that he can get it at one place as cheaply as another, otherwise he will shop around for a bargain and in the meantime he forgets; the impulse to buy that particular article has evaporated. Therefore, with national advertising, general distribution and uniform prices are indispensable. The retail dealer in such an article need make no effort to sell it. It sells itself. The producer's advertising sends purchasers to his store. The established price guarantees a profit. The dealer is merely an inactive conduit to get the article into the hands of the purchaser. He creates nothing, he need do nothing. His customers, as far as that particular advertised article is concerned, are sent to him by the producer.

After the reputation and popularity of a nationally advertised and thoroughly distributed article are established, everyone who knows the article knows its retail price. The consumer knows it as well as he knows the price of a dollar bill. A retail dealer then, for the purpose of attracting custom to himself, advertises and sells the article at a price conspicuously lower than the established and recognized price. Frequently this price is cost or below, the expectation being that any direct loss sustained will more than be made up by the value of the advertising received and in the sale at en-

How common  
is a dealer  
now



hanced prices of other articles whose prices are not known. A dealer, for example, can well afford to sell for sixty-nine cents a watch which is advertised by its producer as a Dollar Watch, and which every one else in his town sells at a dollar, if he can, at the same time, sell for a dollar, a fifty cent chain, or give to the public the impression that he is able to sell everything he deals in, thirty-one cents cheaper than anyone else. The public rushes to buy, not because a watch is advertised at sixty-nine cents, but because a particular watch under a well-known trade mark, which is known to be universally sold at a dollar and believed to be worth it, is offered by this particular dealer at sixty-nine cents. In short, it is the utilization by the dealer of the good will of the producer that makes the situation possible at all. It is the localized good will of the producer in the community in which the retailer does business that makes cutting of prices on the producer's goods worth while. It is the knowledge of the public that the producer's goods are reputable and have the value which the producer has set upon them, by fixing the price that makes their sale at cut prices attractive. One cut price sale invariably provokes others in retaliation. Where one dealer cuts the price of a Dollar Watch to sixty-nine cents, his neighbor, not to be outdone, advertises at fifty-nine cents. Another then cuts to less, with the result that sooner or later, usually sooner, all the dealers in the community are forced to sell this particular watch at a price which yields no profit. The result is that purchasers are persuaded not to buy or to take an unknown article represented to be "just as good." The reputable and popular article is sold under protest or not at all. The local dealer who survives this competition is invariably a department store, or other concern of large resources, which can afford to do business for a time at a loss. The effect of a cut rate war on the producer, whose well advertised and reputable product was the subject of the first attack, is disastrous. Through no fault of his own he is deprived of the distribution of his goods in the community. His market is taken away from him for no reason except that his reputation is good and his products in demand, are of recognized value and known to be worth the price he asks. His advertising expenditure is wasted because ineffective. Purchasers with the impulse to buy cannot gratify it, and it is manifest that such conditions, if at all extensive, will ruin any business. The public are not benefited because, even if for a while

they are able to get an article of recognized value at a cut price, soon they cannot get it at all, or only at great inconvenience.

The first step in this progress of destruction is the utilization, without permission, of the producer's good will for another's private gain, resulting in damage. The result is the same as if the producer's good will were taken away from him by fraud. The effect is identical as if the element of deception, as in ordinary cases of unfair competition, were present.

The law of unfair competition has been extended in the last twenty years to include the suppression of all deceptive artifices by which one trader's customers are taken away from him and transferred to another. The element of deception cannot be the sole consideration. The real injury and the only thing which gives a private right of action is the damage to the business good will of the original trader and its unlicensed utilization by a competitor to his own advantage.

Of late years the courts, in their efforts to circumvent the ingenuity of trade parasites, have begun to enjoin acts of unsportsmanlike dealing, not involving the element of deception, — the duplication of talking machine records,<sup>19</sup> putting of advertising inserts in newspapers by outsiders,<sup>20</sup> and the like, on the ground that this is a diversion of business good will from the creator of it to one who seeks to utilize it for his own benefit. It would seem that predatory price cutting ought to be included in this category.

The effect of malice on otherwise lawful acts is a topic which has provoked endless discussion.<sup>21</sup> In the present instance there is no

<sup>19</sup> *Fonotipia Co. v. Bradley*, 171 Fed. 951 (1909).

<sup>20</sup> *Press Publishing Co. v. Levi Bros. & Co.*, 3 Trade Mark Reporter, 59. Stapleton, J.: "The cases hereinbefore cited demonstrate the jurisdiction of equity, applied to a variety of situations, to protect property from the consequences of injury and damage attributable to unfair business conduct and methods."

<sup>21</sup> See *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L. R. A. N. S. 599 (note), 16 A. & E. Ann. Cas. 807 (1909); *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N. W. 371, 36 L. R. A. 263 (note) (1911); *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673 (note) (1900); *Huskie v. Griffin*, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. N. S. 967 (note) (1909); *Sparks v. McCrary*, 156 Ala. 382, 47 So. 332, 22 L. R. A. N. S. 1224 (note) (1908); *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 Atl. 405, 16 L. R. A. N. S. 746 (note) (1908); *Swain v. Johnson*, 151 N. C. 93, 65 S. E. 619, 28 L. R. A. N. S. 615, 18 HAR. L. REV. 411, 8 Mich. Law Review, 468.



occasion to become entangled with the subtleties connected with the words "malice" and "maliciously." Conceding that the intent with which an act is done is an important consideration where the act is lawful, it is of no consequence where the act is unlawful, and the unauthorized appropriation by a person who has had no hand in its creation of the business good will of another, to his own advantage and the creator's disadvantage and possible ruin, cannot be a lawful act.

It would seem as if an early development of the law ought to be in the direction of putting a stop to predatory price cutting. Of course it must be conceded that the fixing of prices, except perhaps in cases of agency or consignment, cannot be accomplished by contract<sup>22</sup> or, where goods have been sold, by licenses under patents.<sup>23</sup> The essence of the situation here under discussion is not the propriety, legality or necessity of fixing prices. It is in the unnecessary doing of an act calculated to injure and resulting in injury with respect to that most subtle of property rights, business good will. That such conduct is felt to be a real menace is shown by the fact that in at least two widely separated localities it has been made the subject of statutory prohibition. There is a section of the Danish Statute<sup>24</sup> dealing with illegal marking of goods and unfair trading which expressly forbids price cutting, and a recent New Jersey Statute<sup>25</sup> is broad enough to cover it. The

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<sup>22</sup> *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911).

<sup>23</sup> *Bauer v. O'Donnell*, 229 U. S. 1 (1913).

<sup>24</sup> "An Act (No. 137) providing penalty for the use of illegal designation of goods or merchandise, for unfair competition, etc." Approved by King Christian X., June 8, 1912.

"Sec. 13. . . . It shall also be unlawful to sell or offer for sale at lower prices, goods in original packages from producers or wholesale merchants — upon which goods their fixed prices for retail sale is stated, — unless the sale falls under the provisions in sec. 6 or the producer or wholesale dealer has given his consent to such reduction of price, or similar authority might be acquired. Offenders may be liable to fines not exceeding 2000 Kr as the circumstances may demand."

Section 6 refers to clearance sales of damaged goods, removal sales, and the like.

<sup>25</sup> Chapter No. 210, Laws of 1913, State of New Jersey. An Act to prevent unfair competition and unfair trade practices. Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. It shall be unlawful for any merchant, firm or corporation, for the purpose of attracting trade for other goods, to appropriate for his or their own ends a name, brand, trade mark, reputation or good will of any maker in whose product said merchant, firm or corporation deals, or to discriminate against the same, by depreciating the value of such products in the public mind, or by misrepresentation as to value or

Tribunal of Commerce of Brussels (March, 1905), has held certain phases of price cutting to amount to unfair trading.<sup>26</sup>

The opponents of efforts to fix and maintain prices invariably contend that where an article is purchased, title passes and control over it by the seller is gone; that it is the property of the purchasing dealer to do with as he pleases. This has long been the favorite argument of those who justify the perpetration of unfair trading by the use of personal names or by the deceptive use of other devices in which no exclusive right can be maintained. A man's name is undeniably his own property, but he is not permitted to use his own property, whether it be his personal name, or any thing else he may own, in such a way as unnecessarily to cause damage to his neighbor.<sup>27</sup> Ownership is not a license to injure an-

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quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in cases where said goods do not carry any notice prohibiting such practice, and excepting in case of a receiver's sale, or a sale by a concern going out of business.

2. Any person, firm or corporation violating this act shall be liable at the suit of the maker of such branded or trade marked goods, or any other injured person, to an injunction against such practices, and shall be liable in such suit for all damages directly or indirectly caused to the maker by such practices, which said damages may be increased threefold, in the discretion of the court.

3. This act shall take effect immediately. Approved April 1, 1913.

A similar act is before the legislature of Georgia and perhaps other states.

<sup>26</sup> A merchant placed on sale with a great flourish of advertising a well-known product of his competitor at a very low price, at the same time puffing a similar article of his own make, which he offered for sale at a much higher price. The decision of the court condemned the defendant's practice and laid down the following principle applicable to such cases: "Nobody supposes that a merchant cannot sell or dispose of his merchandise at a price less than its cost whenever he shall judge it to be for his interest to unload a particular stock or kind of quality of goods, even though he pursue the policy of sacrificing certain articles to gain an advantage in respect to others; for everyone is free to dispose as he will of what he has legitimately acquired. Nevertheless, the merchant cannot by such an act through fraud or malice prejudice another."

Passing upon the circumstance of the case before it, the court decided that the defendant had with premeditation put on sale the plaintiff's merchandise, not with the expectation of suffering the prejudice which would come from its sale at the price fixed, but for the purpose of vaunting his own product and for the sake of the advantage which he would gain by the demand for his goods unfairly created in this way, in the expectation that his goods and not the goods of his rival would be sold. Thereby he sought to create a fictitious reputation for his goods and one unjustifiable by the circumstances of the market and to cause prejudice to another dealer. This is stated to be suggestive of the French law on the subject. *La Propriété Industrielle*, 1905, p. 233; *Singers Trade Mark Laws of the World*, 73.

<sup>27</sup> *Shaver v. Heller & Merz Co.*, 108 Fed. Rep. 821, 827 (1901). Sanborn, C. J.: "Thus the issue in this case finally narrows to the question whether or not one has the



other. Sixteen String Jack, whose operations on Houndslow Heath have made him immortal, doubtless owned the black mask and

right to use the word 'American' to sell the property of one manufacturer as that of another. From the facts that 'American' is a geographical term, that it may not constitute a trade mark, that no one may have a proprietary interest in it, counsel for the appellants draw the conclusion that everyone has the right to use it to palm off the goods of one vendor as those of another. Does the conclusion necessarily follow from the premises. Everyone has the right to use and enjoy the rays of the sun, but no one may lawfully focus them to burn his neighbor's house. Everyone has the right to use the common highway, but no one may lawfully apply it to purposes of robbery or riot. Everyone has the right to use pen, ink, and paper, but no one may apply them to the purpose of defrauding his neighbor of his property, of making counterfeit money, or of committing forgery. The partner has the right to use his firm's name, but he may not lawfully employ it to cheat his copartner out of his property. Everyone has the right to use his own name, but he may not lawfully apply it to the purpose of filching his property from another of the same name. The use of a geographical or descriptive term confers no better right to perpetrate a fraud than the use of any other expression. The principle of law is general, and without exception. It is that no one may so exercise his own rights as to inflict unnecessary injury upon his neighbor. It is that no one may lawfully palm off the goods of one manufacturer or dealer as those of another to the latter's injury. It prohibits the perpetration of such a fraud by the use of descriptive and geographical terms which are not susceptible of monopolization as trade marks as effectually as it prohibits its commission by the use of any other expressions."

And Judge Sage in *Garrett v. Garrett*, 78 Fed. 472, 477 (1896), in answer to a similar argument, observed: "It was contended for the defendant, upon the hearing, that every man has a right to the use of his own name in business, and, as to the order of injunction below restraining defendant from using white paper for its labels, that every person has a constitutional right to use white paper. These propositions, in the abstract, are undeniably true, but counsel for the time overlooked the fact that, wherever there is an organic law, wherever a constitution is to be found as the basis of the rights of the people, and as the foundation and limit of the legislation and jurisprudence of a government, there the mutual rights of individuals are held in highest regard, and are most jealously protected. Always, in law, a greater right is closely related to a greater obligation. While it is true that every man has a right to use his own name in his own business, it is also true that he has no right to use it for the purpose of stealing the good will of his neighbor's business, nor to commit a fraud upon his neighbor, nor a trespass upon his neighbor's rights or property; and, while it is true that every man has a right to use white paper, it is also true that he has no right to use it for making counterfeit money, nor to commit a forgery. It might as well be set up, in defense of a highwayman, that, because the constitution secures to every man the right to bear arms, he had a constitutional right to rob his victim at the muzzle of a rifle or revolver. It has been held, with reference to trade marks, that a man has not the right to use even his own name so as to deceive the public, and make them believe that he is selling the goods of another of the same name. *Holloway v. Holloway*, 13 Beav. 209 (1850). In *William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.*, 11 Fed. 495 (1882), it was held that, while 'anyone has a right to the use of his own name in business, he may be restrained from its use if he uses it in such a way as to appropriate the good will of a business already established by others of that name; nor can he, by the use of his own

pistol which were the necessary tools of his occupation. A man with his own rifle may lawfully shoot at a target. He ought not in all conscience, however, to be permitted to pot his neighbors and defend on the ground that he owns the gun.

If it be objected that relief against injurious price cutting would be novel, it may be recalled that Lord Hardwicke in 1742<sup>28</sup> refused to enjoin the imitation of a trade mark on that ground, saying:

"Every particular trader has some particular mark or stamp, but I do not know of any instance of granting an injunction here to restrain one trader from using the same mark with another, and I think it would be of mischievous consequence to do it. . . . An objection has been made that the defendant in using this mark prejudices the plaintiff by taking away his customers, but there is no more weight in this than there would be to an objection to one inn-keeper setting up the same sign with another."

It will also be recalled that in 1891<sup>29</sup> Mr. Justice Bradley declined to enjoin the false use of a geographical name at the suit of

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name, appropriate the reputation of another by fraud, either actual or constructive.' The same ruling was made in *Rogers Co. v. Wm. Rogers Mfg. Co.*, by the Court of Appeals of the Second Circuit, as reported in 17 C. C. A. 576, 70 Fed. 1017 (1895). In these last two cases the name was used as a part of the name of a corporation. In the last case the court cites *Manufacturing Co. v. Simpson*, 54 Conn. 527, 9 Atl. 395 (1887), and *Rogers v. Rogers*, 53 Conn. 121, 1 Atl. 807, and 5 Atl. 675 (1885), where a large number of reported cases upon this portion of the law of trade marks is collected. See also *Landreth v. Landreth*, 22 Fed. 41 (1884), where the court held that, 'while a party cannot be enjoined from honestly using his own name in advertising his goods and putting them on the market, where another person, bearing the same surname, has previously used the name in connection with his goods in such manner and for such length of time as to make it a guaranty that the goods bearing the name emanate from him, he will be protected against the use of that name, even by a person bearing the same name, in such form as to constitute a false representation of the origin of the goods, and thereby inducing purchasers to believe that they are purchasing the goods of such other person.'"

<sup>28</sup> *Blanchard v. Hill*, 2 Atk. 484 (1742).

Lord Mansfield in 1783, *Singleton v. Bolton*, 3 Doug. 293, was of a different mind, saying: "If the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie."

<sup>29</sup> *New York & Rosendale Cement Co. v. Coplay Cement Co.*, 44 Fed. 277 (1890), where it was attempted by a dealer manufacturing cement in the town of Rosendale to enjoin the false use of that name on cement made elsewhere.

In 1898, *Pillsbury Washburn Flour Mills Co. v. Eagle*, 86 Fed. 608, where the millers of Minneapolis rightfully using the words "Minnesota Patent, Minneapolis, Minn." upon their flour successfully enjoined a grocer selling flour produced in Milwaukee from falsely using the words "Minnesota Patent, Minneapolis, Minn." thereon, Judge Bunn, speaking for the Circuit Court of Appeals of the Seventh Circuit, observed: "To still say that the court has no jurisdiction or power to grant relief is to fly in the



one truthfully using it, on the ground that to grant such relief "would open a Pandora's box of vexatious litigation." Because a notion is new it is not necessarily unsound. It has always been the boast of courts of equity that they adjust themselves to modern instances and as new wrongs develop new remedies will be applied or old remedies will be enlarged to meet the changed conditions.

"It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions. Necessarily its form and substance has been greatly affected by prevalent economic theories. For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statutes. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individuals from the evils which result from unrestrained business competition. The problem has been to so adjust matters as to preserve the principle of competition, and yet guard against its abuse to the unnecessary injury to the individual. So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men cannot always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well being of society requires that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person."<sup>30</sup>

*Edward S. Rogers.*

CHICAGO, ILL.

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face of the well-grounded principle running through all the cases . . . This rule is so well established, is so general and elastic in its application, and so consonant to the general principles of equity jurisprudence, that it would be difficult to frame a case coming fairly within its spirit and meaning in which a court of chancery will not find a way to afford the proper relief."

<sup>30</sup> Elliott, J., in *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L. R. A. N. S. 599 (1909).

# HARVARD LAW REVIEW.

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THE LAW SCHOOL. — The registration in the School on November 15 of each of the last twelve years is shown in the following table:—

	1902-03	1903-04	1904-05	1905-06	1906-07	1907-08
Res. Grad. . . .	—	4	1	1	—	2
Third year . . .	167	180	182	192	190	171
Second year . . .	196	201	232	216	199	198
First year . . .	228	293	285	243	243	280
Specials . . . .	49	60	58	64	62	63
	640	738	758	716	694	714

	1908-09	1909-10	1910-11	1911-12	1912-13	1913-14
Res. Grad. . . .	—	—	2	3	6	4
Third year . . .	169	187	178	219	176	169
Second year . . .	207	191	238	217	186	197
First year . . .	244	311	296	289	287	260
Unclassified . .	—	—	82	76	84	64
Specials . . . .	64	70	3	4	5	1
	684	759	799	808	744	695

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts:—



## HARVARD GRADUATES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1905	44	4	20	68
1906	52	7	32	91
1907	44	6	40	90
1908	39	5	27	71
1909	30	6	29	65
1910	46	9	38	93
1911	35	5	18	58
1912	36	10	28	74
1913	42	7	33	82
1914	31	6	16	53
1915	24	4	21	49
1916	29	5	23	57

## GRADUATES OF OTHER COLLEGES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1905	23	27	78	128
1906	30	45	92	167
1907	32	33	89	154
1908	19	33	96	148
1909	30	24	98	152
1910	25	27	101	153
1911	26	29	104	159
1912	38	33	150	221
1913	18	27	151	196
1914	27	37	151	215
1915	28	29	165	222
1916	26	15	148	189

## HOLDING NO DEGREE.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	Total of Class.
1905	12	2	18	32	228
1906	25	1	9	35	293
1907	18	5	18	41	285
1908	14	1	9	24	243
1909	11	3	12	26	243
1910	15	1	18	34	280
1911	12	1	14	27	244
1912	7	2	7	16	311
1913	5	—	13	18	296
1914	15	—	6	21	289
1915	8	—	11	16	287
1916	4	—	10	14	260

As the fourteen Harvard seniors in the first-year class have in each instance completed the work required for the A.B. degree, all members of the class are virtually college graduates. The same is true of practically the entire school. Of the sixty-four unclassified students twenty-two have entered this year, and of these, twenty are graduates of a college or university, and two are graduates of law schools.

One hundred and forty-two colleges and universities have representatives now in the school, as compared with one hundred and thirty-six last year and one hundred and forty-five the previous year. In the first-year class eighty-four colleges and universities are represented as follows:—

Harvard 71; Yale 25; Princeton 24; Dartmouth 10; Williams 9; Amherst 6; University of Minnesota 5; University of Pennsylvania 4; University of California, Cornell University, Northwestern University, St. John's College (Md.), 3; University of Alabama, Brown University, Fordham University, Franklin and Marshall College, Georgetown College, Georgetown University, University of Georgia, Grinnell College, University of Kansas, Lafayette College, Miami University, University of Michigan, University of Nebraska, University of North Carolina, Oberlin College, Oxford University (England), Trinity College (Conn.), Union University, Washington and Jefferson College, Washington and Lee University, University of Wisconsin, Wooster University, 2; University of Arkansas, Bates College, Bellevue College, Blackburn College, Boston College, Bowdoin College, Bucknell University, Carleton College, Clark College, Colgate University, Colorado College, University of Colorado, Columbia University, Cornell College, Dickinson College, Earlham College, Grove City College, Hamilton College, Haverford College, Holy Cross College, Howard University, Illinois College, University of Illinois, Indiana University, University of Iowa, Knox College, Lake Forest College, Lincoln University, Marietta University, Monmouth College, Mt. Allison University, Mt. St. Mary's College, Nebraska Wesleyan University, Occidental College, Olivet College, University of Oregon, University of Pittsburgh, Purdue University, Rutgers College, St. Louis University, Southwestern University, Talladega College, University of Tennessee, University of Toronto, Transylvania University, Tri-State College, Tulane University, University of Virginia, University of Washington, Wesleyan University (Conn.), 1.

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**THE HARVARD LEGAL AID BUREAU.** — Last spring a legal aid bureau was organized by a group of second and third year students in the Harvard Law School. It met with instant success. "Its object and purpose," as expressed in its constitution, "shall be to render legal aid and assistance gratuitously to all persons who may appear worthy thereof and who from poverty are unable to procure it." During six weeks of operation in the spring over seventy cases were passed on. Many of these involved considerable work but none were carried into court. During the summer the bureau assisted the State Board of Charities in the prosecution of bastardy cases and the like. Since the opening of the university this fall the work of the bureau has been even more successful than last spring. With the approval of the State Board of Bar Examiners the men are now taking cases into court. They are availing themselves of an old statute, still in force in Massachusetts, which makes it possible for one not a member of the bar to represent clients in court if equipped with a written power of attorney.

The Bureau consists of twenty-seven members, the majority of whom are third year men in the school, but at least ten each year are chosen from the second year class. In filling vacancies the policy is followed of choosing men who stand well in the regular work of the Law School. This does not mean that an exceptionally high stand in scholarship is requisite for election, but a man must show ability in his law studies somewhat



above the average in order to be eligible. A convenient office in the Prospect Union in Central Square, Cambridge, is kept open from four to six and from seven to nine every day. The men take turns keeping office hours, and each man carries through to completion the cases that come in during his hour. Doubtful cases are presented to an executive board for review in order to avoid as far as possible the undesirable result of giving aid to the unworthy.

The success and enthusiasm with which the work has been carried on is due largely to the desire on the part of the men to apply concretely the principles they have learned in the classroom. Legal theories become vitalized and have a new meaning. Thus in addition to the aid given to those in need of it, the men derive from their handling of real cases a practical benefit not afforded by the curriculum.

The Bureau's chairman for the current academic year is Mr. Charles B. Rugg of Worcester, Mass.; the secretary is Mr. Clarence B. Randall of Cambridge. The members from the third year class are Messrs. T. W. Arnold, L. Brewer, J. A. Daly, C. P. Franchot, R. P. Goldman, F. C. Hodgson, R. H. Holt, F. A. Johnson, R. S. Keebler, P. McCollester, W. F. Merrill, E. R. Philbin, H. E. Riddell, K. T. Siddall, and M. C. Teall. The members from the second year are Messrs. J. B. Dempsey, E. G. Fifield, J. Garfield, E. C. Kanzler, E. W. Middleton, F. A. Nagel, F. M. Qua, B. Reiley, A. C. Tener, and R. S. Wilkins. The chairman and secretary under whose auspices the organization was inaugurated were Mr. Campbell Bosson of Boston, Mass., and Mr. Malcolm M. McDermott of Chattanooga, Tenn. The expenses of operation are met by the Law School Society of Phillips Brooks House.

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RIGHT OF MUNICIPALITY TO AMUSE ITS CITIZENS AS A FUNCTION OF GOVERNMENT. — No question is more difficult than the determination of the exact field of government in the modern state. Originally only purposes clearly *governmental* in character were included within it. Gradually, however, under changed economic and social conditions not only have these strictly governmental activities of the state increased in number, but also a variety of public businesses such as waterworks, gas plants, and street railways have come under government control or ownership. A recent case before the Supreme Court of Ohio suggests that there may be still another field for governmental activity by raising the question whether a city may not establish at public expense a municipal moving picture show. *State ex rel. Toledo v. Lynch*, 102 N. E. 670 (Ohio). The court denied the right of the city to establish such a theatre. Whether this holding was absolutely essential for the disposition of the case seems doubtful, for no express authorization to build the theatre had been given by the state legislature, and the court placed great reliance upon the point that a constitutional provision giving to the city general powers of local self-government under which such an authorization might be implied was not yet in effect.<sup>1</sup>

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<sup>1</sup> The opinions of the respective justices were as follows:

Shauck, C. J., held (1) That the powers of local self-government had not yet passed to the municipal council under the constitutional provision; but nevertheless added

Certainly a moving picture show could not be conducted by the city on the same basis that it runs a waterworks or a gas plant. In the case of public utilities any deficit which occurs in running the business may be made up by taxation. But a moving picture theatre has no virtual monopoly of a popular necessity. It cannot be considered a public service company which must serve at a reasonable price all who apply. Hence in the possible use of tax funds for its support the state would not be making a proper return to every taxpayer for his tax paid, and would be violating the fundamental principle that taxes can be used only for public purposes.<sup>2</sup> Moreover, this same principle precludes the city with equal certainty from conducting a theatre as a private business in the hope that it may prove a source of revenue and profit to the municipality. Hence if the city is to undertake the establishment of a moving picture show, it must be upon the ground that it is a governmental function to furnish such amusement for its citizens. On this theory no charge could be made and the doors of the theatre would have to be open to all. The idea that such an undertaking would be a governmental function at first seems startling. Cases holding the maintenance of public parks to be a distinctly governmental function tend to support it.<sup>3</sup> But it may be urged that these decisions are based upon the city's duty to protect the health of its citizens. Band concerts also can be given at public expense;<sup>4</sup> but these, it may be argued, come within the educational provisions which a city may make for its people. It seems, however, that there may well be education for many classes of people in a properly conducted picture show, and such a theatre, by keeping the public away from the cheap dance hall or the saloon, would surely tend to improve the health and moral tone of the community. No case exactly on all fours with the present can be found.<sup>5</sup> True, the authorities are opposed to allowing public expenditures for town celebrations and banquets.<sup>6</sup> But since here the benefit to the citizens is purely in the nature of temporary amusement, the cases seem readily distinguishable.

On the whole, it is impossible to draw any hard and fast line determining what functions are governmental. Within recent years the state seems to have assumed toward its citizens an increasing paternal attitude,

(2) that the establishment of a municipal moving picture theatre was not within these powers.

Wilkin, J., delivered a concurring opinion.

Newman, J., also concurred.

Johnson, J., concurred in (1) but gave no opinion on (2).

Donahue, J., dissented in (1) and on (2), although inclined to think that a theatre might come within powers of local self-government was not satisfied that the present one did so.

Wanamaker, J., dissented on both (1) and (2).

<sup>2</sup> 1 COOLEY, TAXATION, 3 ed., 192; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 696 n.; Opinion of the Justices, 155 Mass. 598, 30 N. E. 1142; *Hayward v. Town of Red Cliff*, 20 Colo. 33, 36 Pac. 795.

<sup>3</sup> 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., §1659; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042; *Board of Park Commissioners v. Prinz*, 127 Ky. 460, 105 S. W. 948.

<sup>4</sup> *Hubbard v. City of Taunton*, 140 Mass. 467, 5 N. E. 157.

<sup>5</sup> For a *dictum* that expenditure for a theatre is not within "necessary town charges," see *Stetson v. Kempton*, 13 Mass. 272, 279.

<sup>6</sup> *Hodges v. Buffalo*, 2 Denio (N. Y.) 110; *Tash v. Adams*, 10 Cush. (Mass.) 252; *Austin v. Coggeshall*, 12 R. I. 329. But public expenditure for town celebrations is sometimes permissible. *Hill v. Selectmen of Easthampton*, 140 Mass. 381, 4 N. E. 811.



— an attitude demanding new and broader powers. But the giving of mere transitory amusement or sense satisfaction, involving no further benefit to citizens or state, would seem hardly governmental in character. However, where amusement carries with it possibilities of education, and of greater health and morality, the problem raised is quite a different one. It would not be surprising if, in the near future, just such expenditures as those refused by the Ohio court, when kept in the limits of reasonable economy, should be held within the functions of government which the state either expressly or impliedly delegates to the municipality.

INTOXICATION AND INSANITY AS DEFENSES IN BILLS AND NOTES. — Historically, mental incompetency was at first considered a complete defense in the law of consensual agreements.<sup>1</sup> Since the party could not understand the nature of the transaction, the possibility of an *animus contrahendi* was by hypothesis negated.<sup>2</sup> On this ground a recent decision allowed the defense of intoxication by an accommodation co-maker against a holder in due course. *Green v. Gunsten*, 142 N. W. 261 (Wis.). The usual modern view, however, arguing from the analogy to infancy, seems to treat contracts and sales by mental incompetents as merely voidable.<sup>3</sup> This permitting of subsequent ratification is a departure, in theory at least, from the old notion that the mental disability prevented the formation of any contract from the outset. This reasoning was still further developed by the holding of a modern English court that mental incapacity is no defense where the other party acted *bonâ fide* and without notice.<sup>4</sup> Such a view is in accord with the present tendency to test the validity of the contract, not by the actual *animus contrahendi*, but by the reasonable impression conveyed to the promisee.<sup>5</sup> And the various limitations imposed by different courts on the right of the mental incompetent to avoid seem satisfactorily explainable only on this ground.

If then mental disability is a defense not because of any inherent defect in the contract, but because the law gives immunity under certain circumstances, the only considerations would seem to be those of fairness and policy. Now aside from express contract, where necessities are furnished to a person *non compos mentis*, a recovery may be had in quasi-contract.<sup>6</sup> Although the liability is not founded on contract but is implied in law, it has been said that a *bonâ fide* purchaser of a negotiable instrument given for necessities may recover for their value against the insane maker.<sup>7</sup> Fairness and policy argue for this result. Yet to

<sup>1</sup> *Sentance v. Poole*, 3 C. & P. 1; *Dexter v. Hall*, 15 Wall. (U. S.) 9; *Yates v. Boen*, 2 Str. 1104.

<sup>2</sup> A peculiar doctrine seems to have existed at one time that a party could not be heard to stultify himself by pleading his lunacy. *Beverley's Case*, 2 Coke 568.

<sup>3</sup> *Wolcott v. Conn. G. L. I. Co.*, 137 Mich. 309, 100 N. W. 569; *Arnold v. Richmond Iron Works*, 1 Gray 434; *Matthews v. Baxter*, L. R. 8 Ex. 132.

<sup>4</sup> *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

<sup>5</sup> See WILLISTON, SALES, § 33.

<sup>6</sup> *Baxter v. Portsmouth*, 5 B. & C. 170; *Waldron v. Davis*, 70 N. J. L. 788, 58 Atl.

293.

<sup>7</sup> *Hosler v. Beard*, 54 Oh. 398, 403, 43 N. E. 1040, 1042. See *Earle v. Reed*, 10

allow a holder, relying solely on his title to the note, to recover in quasi-contract seems clearly anomalous. The doctrine, however, might be considered as simply making the value of the necessities a limit below which the incompetent, in asserting his defense, may not go. Such a partial defense would at first glance seem exceptional. But the defense is neither an equitable plea, since it is available against *bonâ fide* purchasers, nor a denial, since it admits the formation of a contract. It may, however, be explained as a defensive procedural bar to enforcement, like the statute of limitations, available as to the excess of the contract liability over the value received. On this basis the plea would be equally applicable when the instrument is not given for necessities. This view makes possible a consistent theory to explain the various decisions and would seem correct on public policy. The insane deserve protection, and a fair limitation is found in making the estate liable for the full value of the consideration actually received.

Drunkenness, where the negotiable instrument is held by a *bonâ fide* purchaser, may be distinguished. Here the signer has voluntarily put himself into a condition in which foolish business acts are likely. To permit him to throw the loss occasioned by his own recklessness on an innocent purchaser for value would be unfair. As it is no longer a question of distributing the loss between two innocent parties, the defense should not be allowed where there is no fraud or unfair conduct on the part of the holder.

What construction will ultimately be put on the somewhat ambiguous provision in the Negotiable Instruments Law as to defenses available against holders in due course is uncertain.<sup>8</sup> The view suggested, however, makes incapacity neither an obstacle to the creation of a negotiable instrument nor an equitable plea, but offers a bar to enforcement, like the plea of the statute of limitations. And, as the act can hardly contemplate abrogating the statute of limitations, similarly incompetency, considered as a purely procedural defense, should be outside the meaning of the act.

#### AVOIDING SERVICE OF JUDICIAL MANDATES AS CRIMINAL CONTEMPT.

—The frequent avoidance of service of judicial process by witnesses and defendants and the lax public attitude toward such practices makes of practical importance the question how far criminal such avoidance is or how far improper it is for a lawyer to inspire such conduct. In general any act which directly obstructs the course of justice is punishable as a misdemeanor or as contempt of court.<sup>1</sup> Thus if a subpoena has been

Met. 387; *Dubose v. Wheddon*, 4 McC. (S. C.) 221; *Haine v. Tarrant*, 2 Hill (S. C.) 400; *Bradley v. Pratt*, 23 Vt. 378.

<sup>8</sup> NEGOTIABLE INSTRUMENTS LAW, § 57: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 2 ed., p. 65. See 50 Am. L. Reg. N. S. 471, 489.

<sup>1</sup> *Rex v. Tibbits*, [1902] 1 K. B. 77; *Skipworth's Case*, L. R. 9 Q. B. 230; *Globe Newspaper Co. v. Commonwealth*, 188 Mass. 449, 74 N. E. 682.



served it is contempt for a stranger to intimidate,<sup>2</sup> or remove the witness,<sup>3</sup> or for the witness himself to refuse to testify.<sup>4</sup> Such acts are obviously serious obstructions to the course of justice, since the evidence thus lost will cause, or tend to cause, an incorrect verdict. The crime of perjury puts no more serious an obstacle in the path of administering justice than do acts of this character. Such acts would seem to be no less an obstruction of justice merely because the subpoena had not been served. A recent case is authority for this position, holding that a stranger puts himself in contempt of court by attempting to persuade a witness, who had not yet been served, to conceal himself. *Rex v. Carroll*, [1913] Vict. L. R. 380.<sup>5</sup> *A fortiori*, it is true that a material witness by actively avoiding subpoena is obstructing the free course of justice and is guilty of a crime. Moreover, the fact that the subpoena has not actually been issued should not change the result, since it does not make it any less an active concealment of testimony.<sup>6</sup> Another recent case represents the better opinion<sup>7</sup> and convicts of contempt a witness who absented himself before the subpoena had been issued. *Aaron v. State*, 62 So. 419 (Miss.). To make such a thing criminal, however, all the elements of a crime must be present.<sup>8</sup> There must be *mens rea*. There must be an act. For instance, it would not be criminal for one wanted as a witness not to disclose himself, for to remain undisclosed is mere non-feasance.<sup>9</sup>

Where the advice of an attorney causes the witness to commit the crime in question, the attorney would also be guilty. But aside from being a crime, any such act by one who is an officer of the court is highly unethical and ground for disbarment.<sup>10</sup>

Another sort of mandate is a summons to the defendant in a civil suit. It has been said<sup>11</sup> and is commonly thought by practitioners that for a defendant to avoid process in his own case is legitimate. A consideration of the principles involved sustains this view, and shows that this is not inconsistent with convicting of crime a witness who avoids being subpoenaed. Courts may punish for contempt those who insult it in its presence,<sup>12</sup> but avoiding process in one's own case is clearly not a direct insult.<sup>13</sup> Also courts may coerce by imprisonment those who dis-

<sup>2</sup> *Shaw v. Shaw*, 8 Jur. N. S. 141.

<sup>3</sup> *Hale v. State*, 55 Oh. 210, 45 N. E. 199.

<sup>4</sup> *In re Merkle*, 40 Kan. 27, 19 Pac. 401.

<sup>5</sup> *Accord*, *Commonwealth v. Berry*, 141 Ky. 477, 133 S. W. 212; *In re Brule*, 71 Fed. 943; *State v. Keyes*, 8 Vt. 57. See *contra*, *United States v. Coldwell*, 2 Dall. (U. S.) 333, 334. The difference in result between *Montgomery v. Palmer*, 100 Mich. 436, 59 N. W. 148, and *Broderick v. Genesee Circuit Judge*, 125 Mich. 274, 84 N. W. 129, is based on the construction of a statute in the later case which is *contra* to *In re Brule*, 71 Fed. 943.

<sup>6</sup> *In re Brule*, 71 Fed. 943. *Contra*, *McConnell v. State*, 46 Ind. 298.

<sup>7</sup> *Durham v. State*, 97 Miss. 549, 52 So. 627. See also *State v. Keyes*, 8 Vt. 57, 66; *Rex v. Carroll*, [1913] Vict. L. R. 380, 382, Oct. 8 N. Y. L. J. 148. But see 17 Law Notes 104.

<sup>8</sup> See 25 HARV. L. REV. 375.

<sup>9</sup> *Anderson v. State*, 27 Tex. App. 177.

<sup>10</sup> In the matter of *Robinson*, 140 App. Div. 329, 125 N. Y. Supp. 193.

<sup>11</sup> See *In re Rice*, 181 Fed. 217, 221.

<sup>12</sup> See 21 HARV. L. REV. 163.

<sup>13</sup> *In re Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900. See also 21 HARV. L. REV. 166-170.

obey its decrees. Such disobedience though called contempt is entirely different from criminal contempt. Obstructing the course of justice is a third kind of contempt,<sup>14</sup> but avoiding summons scarcely falls within it. In the first place, it may be argued that if a defendant absents himself the trial will merely be delayed, while if a witness does not appear an unjust verdict may be obtained. Again, it would seem that the true function of a court is to give remedies solely to those who, having suffered a wrong, ask redress against a wrongdoer over whom the court has jurisdiction. If the summons is for a wrongdoer only temporarily present, the court has no jurisdiction unless he is personally served.<sup>15</sup> Avoiding service, then, has the effect of preventing a court from securing jurisdiction and does not obstruct it in the exercise of its functions. If the wrongdoer is domiciled in the territorial jurisdiction, the court may render judgment without personal service,<sup>16</sup> and his concealment is merely a delay. Since there seems to be no such crime as delaying the course of justice, avoiding summons would seem not to be a crime.<sup>17</sup>

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LIABILITY OF GRATUITOUS AGENT FOR NON-FEASANCE. — A recent case holds that one who gratuitously undertakes to conduct a transaction as agent for another, and begins to act under the authority conferred, is liable in tort for failure to complete the transaction, notwithstanding his principal was not prejudiced by what he had actually done. *Condon v. Exton-Hall Brokerage & Vessel Agency*, 142 N. Y. Supp. 548.<sup>1</sup> In this case the defendant, having gratuitously agreed to procure the immediate cancellation of an insurance policy issued by the plaintiff, delayed doing this while his sub-agent was investigating the risk, and before the investigation had been completed the loss occurred. The court argues that the agent in this case committed a misfeasance; but a misfeasance is a culpable act causing damage to the plaintiff,<sup>2</sup> while here the damage is due, not to the defendant's act, but to his failure to perform an undertaking. To support the decision, therefore, it must be held that the defendant has in some way assumed a legal duty to perform what he has agreed.

It has been ingeniously contended that there is a class of duties which

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<sup>14</sup> *State ex rel. Morse v. District Court*, 29 Mont. 230, 74 Pac. 412. In this case a court was obstructed in considering a writ of habeas corpus by the defendant handing the body over to extradition knowing of the writ but before service, and thus putting it out of the court's control. *The Cape May and Schellenger's Landing R. Co. v. Johnson*, 35 N. J. Eq. 422. Here the defendant knowing of an injunction but before he had been officially notified, disobeyed it. In both cases fines were imposed.

<sup>15</sup> See *Melkop and Kingman v. Deane and Co.*, 31 Ia. 397, 402.

<sup>16</sup> *Henderson v. Standiford*, 105 Mass. 504.

<sup>17</sup> The case where the defendant resists the process server with physical force is clearly distinguishable. He is guilty of a crime (see *Conover v. Wood*, 5 Abb. Prac. 84, 88), because the public good requires officers to perform their functions without overcoming resistance. (See 1 BISHOP, CRIMINAL LAW, 7 ed., sec. 465.)

<sup>1</sup> The following decisions might be thought to support the result in the principal case: *Wilkinson v. Coverdale*, 1 Esp. 175; *Johnston v. Graham*, 14 U. C. C. P. 9; see also *Thorne v. Deas*, 4 Johns. (N. Y.) 84, 97; *Vickery v. Lanier*, 1 Metc. (Ky.) 133, 135.

<sup>2</sup> *Bell v. Josselyn*, 3 Gray (Mass.) 309; *Illinois Central R. R. Co. v. Foulkes*, 191 Ill. 57, 68, 60 N. E. 890; see 2 BOUVIER'S LAW DICTIONARY, 421.



are assumed independently of contract by those who voluntarily interfere in others' affairs.<sup>3</sup> But the decisions which seem to support this view really do nothing but enforce the general duty of every man to so conduct himself that his acts shall not injure others. Thus, where the defendant's interference, though beneficial in a way, exposes the plaintiff to some new risk of injury, the defendant must be diligent to prevent that injury from occurring.<sup>4</sup> So, also, where the defendant, by giving his aid, excludes the probable assistance of others, he may not abandon the plaintiff without restoring to him full opportunity to receive other assistance.<sup>5</sup> Likewise, one who induces others to rely on the efficacy of his executed acts to produce a certain result is liable to them, if, through his negligence, the reliance results in damage.<sup>6</sup> None of these doctrines involve the proposition that to touch another's affairs is to assume a duty to make good all the benefits to accomplish which the interference was first undertaken. True, the principle which makes a defendant liable to one whom he has induced to rely on the efficacy of his past conduct, ought equally to make him liable for non-performance of his promise to one who takes a risk in reliance on that; but it seems too late to contend that such is the law, for where the plaintiff has relied solely on a promise, he must prove consideration.<sup>7</sup>

Still another analogy which the decisions have failed to recognize tends to support the principal case. Under the Roman law the recipient of either a chattel or a power of attorney became a "mandatary," bound to apply the chattel or the power to the purposes for which it was given.<sup>8</sup> A like doctrine in respect to bailments has been recognized at common law, with the help of the theory that the delivery of the chattel constitutes consideration for any promise the bailee may make in relation to it.<sup>9</sup> But consideration, in the usual sense of something bargained for,<sup>10</sup> is not present in the case where the bailee takes the chattel with the sole purpose of doing the bailor a favor. Nevertheless, the result seems to be good law to-day. Apparently the law treats a bailee for

<sup>3</sup> BEALE, GRATUITOUS UNDERTAKINGS, 5 HARV. L. REV. 222.

<sup>4</sup> Such a case arises where the defendant helps the intoxicated plaintiff half-way up a flight of stairs, and leaves him. *Black v. New York, N. H. & H. R. R. Co.*, 193 Mass. 448, 79 N. E. 797. The resulting duty is to get the plaintiff safely off the stairs, not necessarily to take him to the top. The same principle is involved with others in *Cincinnati, N. O. & T. P. Ry. Co. v. Marrs' Adm'x*, 27 Ky. L. Rep. 388, 390, 85 S. W. 188, 189.

<sup>5</sup> As where one living alone in charge of a helpless invalid neglects either to care for her or call in others to do so. *Regina v. Instan*, [1893] 1 Q. B. 460; *contra*, *Rex v. Smith*, 2 C. & P. 449.

<sup>6</sup> *Gill v. Middleton*, 105 Mass. 477; *Gregor v. Cady*, 82 Me. 131, 19 Atl. 802. It is submitted that *Wilkinson v. Coverdale*, *supra*, and *Johnston v. Graham*, *supra*, fall within this principle.

<sup>7</sup> *Kirksey v. Kirksey*, 8 Ala. 131; *Thorne v. Deas*, *supra*. See WALD'S POLLOCK ON CONTRACTS, 3 ed., 186. But see 26 HARV. L. REV. 429.

<sup>8</sup> See STORY, BAILMENTS, § 137; STORY, AGENCY, § 4, and authorities there cited.

<sup>9</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909, 919; *Whitehead v. Greetham*, 1 McClel. & Y. 205, 211; *Robinson v. Threadgill*, 13 Ired. (N. C.) 39, 42.

<sup>10</sup> The old declaration in special assumpsit recites that whereas the plaintiff "at the special instance and request of" the defendant, gave consideration, "the defendant promised, etc." The idea of consideration here is evidently "the price for which the promise of the other is bought." *Kirksey v. Kirksey*, *supra*; WALD'S POLLOCK ON CONTRACTS, 3 ed., 185.

the bailor's benefit as a trustee of the possession, and binds him to perform all the terms of the bailment, precisely as equity holds the trustee of a legal title to perform all the terms of his trust.<sup>11</sup> If so, it ought logically to adopt the rest of the Roman doctrine of "mandate," and treat every power to act as agent as received in trust to effect the purposes for which it was conferred. But this would conflict with decisions which hold that neither the promise<sup>12</sup> nor the attempt<sup>13</sup> to carry out a transaction as agent, nor both together,<sup>14</sup> can create a duty to complete it. Inasmuch as either alone would, on principle, be an acceptance of the trust, the authorities must be taken as standing definitely against the suggested doctrine. It seems, therefore, that the rule of the principal case, making a gratuitous agent who begins to act liable for pure non-feasance, while logically sound, cannot be supported on the decisions.

#### STATUTES AUTHORIZING ASSESSMENT OF PUNISHMENT BY THE JURY. —

In several states an interesting change from the old common-law procedure has been effected by statutes which invest the jury with the judicial function of imposing sentence. In withdrawing this right from the judge, the purpose is to overcome the reluctance of juries, who, because of fear that the judicial sentence may be extreme, hesitate to convict a defendant who, they feel, deserves light punishment on account of extenuating circumstances.<sup>1</sup> The prisoner, particularly when he is accused of a crime against which popular indignation runs high, often prefers to plead guilty because of his belief that the trial judge will accord him a lighter penalty than would a prejudiced jury. This situation is expressly provided for in the type of statute which requires the jury in all cases to mete out the punishment,<sup>2</sup> and also in the statutes which expressly reserve to the court their sentencing power in case the defendant pleads guilty.<sup>3</sup> But there is another class of statutes which merely provides that the jury may add the prisoner's sentence to their verdict of guilty.<sup>4</sup> It is difficult to say whether in those jurisdictions an accused by pleading

<sup>11</sup> This proposition may seem novel. But if a gratuitous bailee is bound by his undertaking to feed the bailor's horse, it is difficult to see why he is not bound by other affirmative undertakings, as to transport a chattel, or present a note for payment. If the contract theory of these duties is abandoned, no alternative seems open except a "legal trust." The theory suggested seems to underly the reasoning in the following cases: *Coggs v. Bernard*, *supra*; *Smith v. Lascelles*, 2 T. R. 187, 190; *Robinson v. Threadgill*, *supra*; *Boyer v. State Farmer's Mut. Hail Ins. Co.*, 86 Kan. 442, 121 Pac. 329. See also STORY, BAILMENTS, § 171.

<sup>12</sup> *Thorne v. Deas*, *supra*; *Balfe v. West*, 13 C. B. 466.

<sup>13</sup> *Vickery v. Lanier*, 1 Metc. (Ky.) 133.

<sup>14</sup> *Morrison v. Orr*, 13 Stew. & P. (Ala.) 49.

<sup>1</sup> See *People v. Welch*, 49 Cal. 174-179. An examination of the murder cases under one such statute shows this result is not always attained. As a general rule, juries under the California statute, instead of utilizing their power for the purpose of passing the light sentence on a person with some moral or other excuse, have given life imprisonment to persons who committed picturesque murders, and sentenced to death those whose methods were purely brutal. See SALEILLES, *INDIVIDUALIZATION OF PUNISHMENT*, Introduction to English Version by Prof. Roscoe Pound, p. xvi.

<sup>2</sup> *Wartner v. State*, 102 Ind. 51, 1 N. E. 65.

<sup>3</sup> *People v. Noll*, 20 Cal. 164.

<sup>4</sup> *Territory v. Miller*, 4 Dak. 173, 29 N. W. 7.



guilty can escape jury sentence. At common law if the accused pleads guilty there is no need for the verdict of the jury. It would seem, therefore, since statutes in derogation of the common law must be strictly construed, that the vesting of an extraordinary power of sentence when connected with verdict does not necessitate the exercise of such power when a verdict is not demanded.<sup>5</sup> A different result, however, was reached under a statute of this class in the District of Columbia. *United States v. Green*, 41 Wash. L. Rep. 216. This statute authorized a sentence in the crime of rape of five to thirty years by the court, but provided that the jury might add to their verdict of guilty the death sentence.<sup>6</sup> The accused pleaded guilty to secure the lighter punishment at the hands of the court, but was forced to submit to jury trial on the ground that a construction of the statute which would permit the fear of heavier punishment to induce a plea of guilty would be unconstitutional. The court argued that a power in the jury to impose a heavier punishment puts a penalty on pleading innocence; that it so far induces an accused to avoid trial that it impairs the right to jury trial guaranteed by the Sixth Amendment to the Constitution;<sup>7</sup> and that by practically compelling a man to plead guilty it would force him to be a witness against himself, contrary to the Fifth Amendment.

It is submitted, however, that there is no constitutional ground or any basis of public policy for distinguishing this statute from the general class. It is usually understood that if a man pleads guilty he will be let off with a lighter sentence, yet it has never been seriously argued that such a practice is against public policy because it places a penalty on pleading innocence. And since there is no reason to suppose that if a defendant goes to trial he will get a more severe punishment than he deserves, it is hard to see how he suffers any disadvantage because the statute attaches a possible benefit to a plea of guilty. On the same argument, since the prisoner will have full justice if he pleads not guilty, it cannot be said that the further benefit he may get through pleading guilty deprives him of free choice of jury trial under the Sixth Amendment.

The Fifth Amendment guarantees that an accused will not be forced to testify against himself. It seems clear that to refuse every plea of

<sup>5</sup> *Territory v. Miller*, *supra*.

<sup>6</sup> CODE OF LAW, DISTRICT OF COLUMBIA, 808. "Whoever is guilty of . . . shall be imprisoned for not less than five nor more than thirty years: *Provided*, that in any case of rape, the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by hanging. *Provided further*, that if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided for in this section." Though this statute is rather unusual in its provisions, its purpose would seem to be the same as in those mentioned above, since, having the death penalty solely in their hands, the jury will not hesitate in a verdict of guilty for fear of an unduly harsh sentence from the judge.

<sup>7</sup> U. S. CONST. AMENDMENT VI. "In criminal prosecutions the accused shall enjoy a right to a speedy and public trial by an impartial jury of the state where the crime shall have been committed," etc. This amendment applies only to trials in the federal courts. *Eilenbecker v. Plymouth County*, 134 U. S. 31, 10 Sup. Ct. 424. It is considered as qualifying and explaining Article III by enumerating the common-law rights conferred by this section. See *Callan v. Wilson*, 127 U. S. 540-549, 8 Sup. Ct. 1301-1303.

guilty induced by hope of lighter punishment on the ground that he has been forced to incriminate himself would be preposterous. It is hard to justify, then, a different result when, under a statute such as that in the principal case, a defendant is allowed to throw himself wholly on the court's mercy having no certainty that he has thereby bettered himself. It would appear, then, that the natural construction of this statute should have been adopted.<sup>8</sup>

**LIABILITY OF PUBLIC SERVICE COMPANY FOR SERVANTS' ASSAULTS AND INSULTS PROVOKED BY THE PLAINTIFF.**—A late Georgia case holds that a passenger who, by abusive language, has provoked an assault by the motorman, cannot recover damages for the assault from the railway company. *Binder v. Georgia Ry. & Electric Co.*, 79 S. E. 216. The Georgia rule, as the court in the principal case assumes, seems to be that insulting words justify a private individual in assaulting the insulter.<sup>1</sup> The general rule is *contra*;<sup>2</sup> hence the exact problem of the principal case could hardly arise elsewhere.<sup>3</sup> The case, however, has an important bearing on the mooted general question of whether a justification which would excuse a private individual will justify a breach of public duty by the company. The problem resolves itself into whether the inconvenience and peril which might result to the traveling public, in case such a justification is allowed, is overbalanced by the necessity for encouraging self-protection and allowing retaliation for insult.

<sup>8</sup> The Third Article of the Constitution provides that "The trial of all crimes except in cases of impeachment, shall be by jury," etc. (applying only to federal courts. *Eilenbecker v. Plymouth County*, *supra*). It has been argued that the mandatory words in this article necessitate jury trials in all criminal cases. But the Constitution is interpreted in the light of the common law at the date of its adoption. *West v. Gammon*, 98 Fed. 420. So since at common law an accused could be sentenced by the court on a plea of guilty, under the Constitution such a sentence will stand. *Teritory v. Miller*, 4 Dak. 173, 29 N. W. 7; *West v. Gammon*, 98 Fed. 426.

<sup>1</sup> The doubt in this matter is whether § 103 of the Georgia Penal Code, which provides that opprobrious words may be found by the jury to justify an assault, applies to civil proceedings. It has been held that it does not. *Berkner v. Dannenberg*, 116 Ga. 954, 43 S. E. 463. But other cases seem to decide that it does. See *Cross v. Carter*, 100 Ga. 632, 633, 28 S. E. 390. And see dissenting opinion of Fish, J., in *Berkner v. Dannenberg*, *supra*.

<sup>2</sup> *Rarden v. Maddox*, 141 Ala. 806, 39 So. 95; *Goucher v. Jamieson*, 124 Mich. 21, 82 N. W. 663. Many cases are collected in 3 Cyc. 1077, note 5.

<sup>3</sup> In jurisdictions where insult is deemed not to justify an assault, it is almost universally held that the insulting plaintiff can recover from the railroad company for assault by its servant. *Haman v. Omaha Ry. Co.*, 35 Neb. 74, 52 N. W. 830; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 870. *Birmingham Ry. & Electric Co. v. Baird*, 130 Ala. 334, 30 So. 456; *Scott v. Central Park, etc. Ry. Co.*, 6 N. Y. Supp. 382, *contra*, is overruled by *Weber v. Brooklyn, etc. R. Co.*, 62 N. Y. Supp. 1; and *Harrison v. Fink*, 42 Fed. 787, *contra*, is in the federal circuit court for the northern district of Georgia.

In this connection an interesting doctrine which for a time prevailed in Georgia should be noted. A line of cases denied the insulting plaintiff a recovery for the assault on the ground that he had "put the servant out of tune," and so could not hold the master when the servant "did not furnish the proper music," on the analogy that a servant who, by tampering with his master's appliances, makes them unfit for use, cannot recover if he is injured thereby. *Peavy v. Georgia R. Co.*, 81 Ga. 485, 8 S. E. 70; *City Electric Ry. Co. v. Shropshire*, 101 Ga. 33, 28 S. E. 508. The only possible merit in the analogy is its picturesqueness, and the doctrine was repudiated in *Mason v. Nashville, etc. Ry. Co.*, 135 Ga. 741, 70 S. E. 225.



A public service company is not liable if an employee in self-defense strikes a passenger.<sup>4</sup> The basic reasons for this rule are that the state's interests demand that every man shall be allowed to defend himself and that no one shall be compelled to sacrifice his self-respect by passively submitting to assault; and these considerations outweigh the possible harm to which the employee's exercise of self-defense might subject the traveling public. Now a public service company is liable if its servants insult a passenger,<sup>5</sup> though no action lies against a private individual for mere insult.<sup>6</sup> Public policy imposes upon public servants a duty to protect their patrons in every way.<sup>7</sup> This duty includes protection against insults by the company's servants as well as by other persons. When the insult is provoked by the passenger, the company, it is submitted, should still be liable. The convenience of the traveling public requires that the company's servants should not bandy vituperative epithets with every profane passenger. Such verbal quarrels would not only continually shock and annoy other passengers, but, by terminating in fights, would often imperil their safety.<sup>8</sup> True, passengers can never be wholly immune from such dangers; but this is no argument for increasing them by allowing the servants to return abuse for abuse.<sup>9</sup> It cannot be argued here, as in the self-defense case, that the state's interests make the answering of insult necessary. Those interests are not jeopardized if the employees of a public servant are required to refrain from profanity contests with disorderly patrons. Nor is there sufficient weight in the contention that the plaintiff's conduct should bar him. In the first place, the plaintiff in a sense is enforcing the public rights as well as his own.<sup>10</sup> Again, since he is under no legal duty to refrain from insult, he has at most violated only a moral duty which the law cannot recognize.<sup>11</sup> This conclusion is not unsupported by analogy. A female plaintiff has been allowed to recover from the company for indecent proposals made by a conductor, even though they were encouraged by her immodest language.<sup>12</sup> If the arguments herein advanced are sound, the result reached by the Georgia case is clearly erroneous. For if the company ought to be liable when the provoked servant merely insults a

<sup>4</sup> *Moore v. Columbia & G. R. Co.*, 38 S. C. 1, 16 S. E. 781; *Hayes v. St. Louis R. Co.*, 15 Mo. App. 583. See *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 30, 30 Atl. 560, 561; *New Orleans & Northeastern R. Co. v. Jopes*, 142 U. S. 18, 25.

<sup>5</sup> *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S. W. 557.

<sup>6</sup> Unless, of course, it is libellous or slanderous, and is published.

<sup>7</sup> Otherwise, equal service to all would be impossible. See *Dunn v. Western Union Tel. Co.*, 2 Ga. App. 845, 850, 59 S. E. 189, 191.

<sup>8</sup> See *Gallena v. Hot Springs R. Co.*, 13 Fed. 116, 122. The conductor's position makes it fair to say that somewhat more is expected of him than of the ordinary man.

<sup>9</sup> It should be remembered, too, that the conductor has a right, and a duty, to eject obnoxious passengers. Ejecting the profane passenger is certainly a better solution of the matter than returning his profanity.

<sup>10</sup> An interesting analogy is found in cases holding that a servant cannot assume the risks of his master's failure to perform a statutory duty, for which failure the master is criminally liable. Here, too, the plaintiff, in suing, is upholding the public interests as well as his own. See 26 HARV. L. REV. 262. Since in cases like the principal case there is no criminal liability, such enforcement is very necessary.

<sup>11</sup> The duty here is merely the duty, which in morals every man has, to conduct himself with decency. As such, it cannot be recognized by the law any more than the moral duty of a man to provide for his brother, to feed the starving, etc.

<sup>12</sup> *Strother v. Aberdeen & A. R. Co.*, 123 N. C. 197, 31 S. E. 386.

passenger, *a fortiori* ought it to be liable when he assaults a passenger, even though he may<sup>13</sup> be under no individual liability in either case.

There remains the question whether the plaintiff's conduct in provoking the insult should be considered in mitigation of compensatory damages. The courts are divided where an insult by the plaintiff provokes the assault by the servant of the defendant company.<sup>14</sup> On the one hand, it is urged that the plaintiff, having brought the injury upon himself, should not recover full damages therefor; on the other, that to allow such mitigation may in effect make provocation a justification, since it enables the jury to give only nominal damages. Regardless of whether or not mitigation should be allowed in actions between individuals,<sup>15</sup> the true view seems to be that the vital interest of the public forbids its application in suits against public service companies.<sup>16</sup>

## RECENT CASES.

ADVERSE POSSESSION — SUBJECT MATTER AND EXTENT OF ADVERSE POSSESSION — MINERALS: SEVERANCE FROM SURFACE BY DEED: GRANTEE OF ADVERSE POSSESSOR HOLDING POSSESSION FOR HIS GRANTOR. — The plaintiff's grantor took possession of certain land without any paper title and held it adversely for seven years. He then conveyed the surface of the land to X., reserving the minerals; and X. and his grantees entering held possession of the surface for the remainder of the statutory period, no one meanwhile operating the mines. Thereafter the plaintiff bought the minerals from the grantor, and brings this bill to quiet his title to them. *Held*, that the plaintiff is entitled to the relief sought. *Moore v. Empire Land Co.*, 61 So. 940 (Ala.).

The court decides that while the conveyance of the surface reserving the minerals actually worked a severance of the mineral and surface rights as between grantor and grantee, nevertheless as regards all outsiders the possession of the surface by the grantee is also a possession of the minerals. This possession of the minerals, however, the grantee holds for his grantor, and at the end of the statutory period the grantor, though not in actual possession himself, has obtained a good title to the mineral rights by adverse possession. Hence on this reasoning it follows that a purchaser from him should be permitted to quiet title to the minerals. In a similar Alabama case it was held conversely that adverse possession of the surface by a grantor was also a possession of the minerals for the benefit of his grantee of the minerals. *Black Warrior Coal Co. v. West*, 170 Ala. 346, 54 So. 200, see 24 HARV. L. REV. 582, for an editorial comment on this case.

<sup>13</sup> The word "may" is used advisedly. It is possible that in time the employees of a public service company will themselves be regarded as public servants. This doctrine, however, is yet in its incipency.

<sup>14</sup> That it should — *Houston, etc. R. Co. v. Batchler*, 32 Tex. Civ. App. 14, 73 S. W. 981; that it should not — *Mahoning Valley Ry. Co. v. De Pascale*, 70 Ohio St. 179, 71 N. W. 633. That it should mitigate exemplary damages, all courts agree. This is satisfactory, since the awarding of such damages against a corporation whose proper officers have not ordered the acts complained of, is anomalous, in that it punishes a personally innocent defendant. See SEDGWICK, DAMAGES, 9 ed., § 380.

<sup>15</sup> The general rule seems to allow mitigation if the insult is recent. *Daniel v. Giles*, 108 Tenn. 242, 66 S. W. 1128. See *Le Laurin v. Murray*, 75 Ark. 232, 238, 87 S. W. 131, 133. *Contra*, *Goldsmith's Adm'r v. Joy*, 61 Vt. 488, 17 Atl. 1010.

<sup>16</sup> The analogy referred to in note 10, *supra*, is applicable here also.



AGENCY — PRINCIPAL'S RIGHTS AGAINST AGENT — LIABILITY OF GRATUITOUS AGENT FOR NON-FEASANCE. — The defendant, at the plaintiff's request, undertook gratuitously to procure the immediate cancellation of an insurance policy issued by the plaintiff. The defendant directed its local correspondent to investigate the risk with a view to action in the future. The policy remained outstanding, and the plaintiff was obliged to indemnify for a loss. *Held*, that the defendant is liable in tort. *Condon v. Exton-Hall Brokerage & Vessel Agency*, 142 N. Y. Supp. 548 (City Court of New York).

For a discussion of the liability of a gratuitous agent for non-feasance, see p. 167 of this issue of the REVIEW.

AGENCY — PRINCIPAL'S RIGHTS AGAINST THIRD PERSONS IN CONTRACTS — EFFECT OF RECEIPT OF USURIOUS COMMISSION BY AGENT. — The plaintiff entrusted \$400 to his agent to loan. The agent loaned \$350 to the defendant, taking the latter's note for the sum with legal interest, and exacting besides a \$50 commission for himself. The principal knew nothing of the commission, nor derived any benefit from it. In a suit on the note, the defendant sets up usury. *Held*, the principal can recover, for in exacting the bonus the agent was not acting within his authority. *Brown v. Johnson*, 134 Pac. 590.

The result is not altogether free from difficulties, although in line with the weight of the authorities. *Condit v. Baldwin*, 21 N. Y. 219; *Call v. Palmer*, 116 U. S. 98. The problem arises whether the transaction is one agreement or two distinct agreements. Now where the principal, or the agent acting within his authority, makes the contract, or where the principal is undisclosed, there is one agreement, and the whole is tainted by usury. *Hall v. Maudlin*, 58 Minn. 137, 59 N. W. 985; *Erickson v. Bell*, 53 Ia. 627, 6 N. W. 19. So it may be argued the contract is an entirety here. *Security Co. v. Hendrickson*, 13 Neb. 157, 12 N. W. 916. See *Condit v. Baldwin*, *supra*, 229. If so, the contract is the principal's, and since it is unenforceable for usury, even the sum lent cannot be recovered. *Security Co. v. Hendrickson*, *supra*. Or better, the contract fails entirely, not on account of the usury, but because the agent exceeded his authority in making it. See *Bell v. Day*, 32 N. Y. 165, 183; *Condit v. Baldwin*, *supra*, 230. The principal, under the last construction, should recover his money in an action for money had and received. See *Bell v. Day*, *supra*, 179, 183; *Condit v. Baldwin*, *supra*, 230. This latter view seems the best practical solution. But as a matter of fact it seems there are two agreements. *Condit v. Baldwin*, *supra*. That was the intention of the parties. So the principal case appears logically correct in allowing a recovery on the good contract. Nor is there any difficulty with the consideration, for the loan was paid. No doubt if the principal had received the bonus from the agent, he would be barred on account of his participation in the illegality. *Bliven v. Lydecker*, 130 N. Y. 102.

ASSAULT AND BATTERY — CRIMINAL RESPONSIBILITY — SPECIFIC INTENT OF DEFENDANTS ENGAGED IN COMMON ENTERPRISE. — While the defendants were endeavoring to escape apprehension for poaching, one of them shot a gamekeeper. On an indictment for shooting *with intent to murder*, the court charged that both would be guilty if there had been any arrangement between them to resist capture at all costs, or if the nature of the enterprise was such that both must have realized that resistance at all costs was likely to happen. *Held*, that the instructions were correct. *Rex v. Pridmore*, 77 J. P. 339 (C. C. A.).

All who embark upon a common unlawful enterprise are responsible for the intended results of their adventure, since each of them is equally a proximate cause of the other's acts. *Rex v. Whithorne*, 3 C. & P. 394; *Ferguson v. State*, 32 Ga. 658. Even if the results are not intended, no break in the causation relieves the confederates from responsibility so long as the results are foreseeable

from the nature of the common design. *Regina v. Salmon*, 14 Cox C. C. 494; *Williams v. State*, 81 Ala. 1, 1 So. 179. But where either sudden impulse or preconceived purpose leads one of the number to perpetrate a crime not incidental to the common enterprise, he alone may be held therefor. *Rex v. Hawkins*, 3 C. & P. 392; *Rex v. Collison*, 4 C. & P. 565. And when, as in the principal case, a specific intent is an element of the crime, the instructions of the trial judge should require a finding that such intent existed in each defendant in order to establish his guilt. *Regina v. Bowen*, Car. & M. 149; *State v. Taylor*, 70 Vt. 1, 39 Atl. 447. Such requirements would not be satisfied in the principal case by proof that if the bullet had killed instead of wounding the gamekeeper the crime would have been murder, for malice aforethought may be inferred from a felonious course of action, without a positive intention to murder. *Regina v. Cruse*, 8 C. & P. 541. The specific intent necessary in the principal case is a positive intention to murder. The instructions given only require a realization that killing may probably ensue, which although sufficient to constitute malice aforethought is not intent to murder.

**BAILMENTS — BAILOR AND BAILEE — CONVERSION BY BAILEE — DEVIATION FROM TERMS OF BAILMENT WITHOUT DAMAGE DURING DEVIATION.** — The plaintiff, a liveryman, rented a horse and carriage to the defendant to drive from A. to B. The defendant in violation of the terms of the bailment drove beyond B. to C. After returning to B., the horse was killed without fault on the part of the defendant and not as a result of the deviation. *Held*, that the defendant is not liable in trover. *Daugherty v. Reveal*, 102 N. E. 381 (Ind. App. Ct.).

In general, to sustain an action for conversion, there must be an exercise of dominion over property inconsistent with, or in repudiation of, the true owner's rights. *Johnson v. Farr*, 60 N. H. 426. See *Spooner v. Holmes*, 102 Mass. 503. If this exercise of dominion be under an outright claim of ownership, it is of itself a conversion, even if made by mistake. *Hartford Ice Co. v. Greenwood's Co.*, 61 Conn. 166, 23 Atl. 91. But if it be the temporary use of another's property, special circumstances of the case should govern the decision. Where damage occurs during an intentional deviation, trover will lie. *Burnard v. Haggis*, 14 C. B. N. S. 45; *Perham v. Coney*, 117 Mass. 102. *Contra*, *Harvey v. Epes*, 12 Grat. 153. But if the deviation be unintentional, even if accompanied by damage, it would not be conversion. *Spooner v. Manchester*, 133 Mass. 270. Substantial damage, moreover, is often held an indispensable element in the plaintiff's cause. *Fouldes v. Willoughby*, 8 M. & W. 540; *Simmons v. Lillystone*, 8 Exch. 431. Thus have the courts taken a common-sense view of this subject, and accordingly it is submitted the principal case is correct in holding technical wrong unconnected with loss insufficient to impose full liability upon the defendant. This seems fairer than the old rule that mere deviation is conversion. *Wheelock v. Wheelwright*, 5 Mass. 104. And what modern authority there is, is in accord. *Farkas v. Powell*, 86 Ga. 800, 13 S. E. 200; *Doolittle v. Shaw*, 92 Ia. 348, 60 N. W. 621. See 8 HARV. L. REV. 280.

**BANKRUPTCY — PARTNERSHIP CASES — POWER OF BANKRUPTCY COURT TO ADMINISTER NON-BANKRUPT PARTNER'S ESTATE.** — The court of bankruptcy having adjudicated two partners and the bankrupt firm, the trustee petitions that as part of the administration of the firm bankruptcy, the court should be allowed to draw to itself for administration the estate of a third partner, not adjudicated. *Held*, that such order be made. *Francis v. McNeal*, 228 U. S. 695, 33 Sup. Ct. 701, affirming 186 Fed. 481 (C. C. A. 3d Cir.).

The Supreme Court settles this controverted point in accordance with the weight of authority of the lower federal courts. *In re Meyer*, 98 Fed. 970



(C. C. A. 2d Cir.); *In re Stokes*, 106 Fed. 312 (D. C.); *Dichas v. Barnes*, 140 Fed. 849 (C. C. A. 6th Cir.). *Contra*, *In re Bertenshaw*, 157 Fed. 363 (C. C. A. 8th Cir.). But it practically denies the expression of the entity theory of partnership in the Bankruptcy Act of 1898. That theory would lead to a contrary result, since the court of bankruptcy would have no right to administer any property which does not belong to the bankrupt. *In re Bertenshaw*, 157 Fed. 363 (C. C. A. 8th Cir.). See 18 HARV. L. REV. 495; 20 HARV. L. REV. 589, 594; 19 HARV. L. REV. 615. The case also decides that it is impossible for the firm to be insolvent so long as any of its members remain able to pay its debts, a necessary result of the aggregate theory of partnership adopted by the court. *Vaccaro v. Security Bank*, 103 Fed. 436 (C. C. A. 6th Cir.); *In re Blair*, 99 Fed. 76. Those who desired to see a recognition of the entity theory in the act would of course have reached a contrary result. *In re Bertenshaw*, 157 Fed. 363 (C. C. A. 6th Cir.). See COLLIER, BANKRUPTCY, 4 ed., 119; 18 HARV. L. REV. 495, 498. A recent decision in the Federal District Court for Southern New York decided after the principal case but not citing it, reaches the same result, because the court felt bound by authority, arguing nevertheless for the adoption of the entity theory. *In re Samuels Lesser. Ex parte Quinn*, 30 Am. B. R. 293 (D. C. for So. N. Y.).

BANKS AND BANKING — DEPOSITS: LIABILITY TO DEPOSITOR — DEPOSIT TO PERSONAL ACCOUNT OF CHECK PAYABLE TO TRUSTEE. — The defendant bank allowed a guardian to deposit to his personal account a check which, to the knowledge of the bank, represented guardianship funds. The guardian later checked out his entire deposit and absconded. *Held*, that the bank is liable to the surety on the guardian's bond. *United States Fidelity & Guaranty Co. v. People's Bank*, 157 S. W. 414 (Tenn.).

Ordinarily a trustee who deposits trust funds to his personal account commits a breach of trust. *McAllister v. Commonwealth*, 30 Pa. 536; *Booth v. Wilkinson*, 78 Wis. 652, 47 N. W. 1128. *Contra*, *Goodwin v. American National Bank*, 48 Conn. 550. Such a form of deposit in many cases may cause the *cestui* great difficulty in establishing his right to this specific fund. The deceiving appearance may induce creditors of the trustee to attach it, or, in case of the trustee's death, may induce his executor to claim it, thus greatly embarrassing the administration of the trust. *Wagner v. Coen*, 41 W. Va. 351, 23 S. E. 735; *School District v. First National Bank*, 102 Mass. 174. Although a bank must honor checks drawn on it by depositing trustees without inquiry as to the intended use of the money, and is therefore not liable for subsequent misappropriation by the trustee, yet, if it knowingly assists a trustee in a breach of trust by allowing a misuse of banking facilities it is liable to the *cestui* for loss caused thereby. This assistance may be by transferring funds from the separate trust account to the personal account of the trustee, or by setting off a deposit of trust funds against a debt due the bank from the trustee. Or it may consist in accepting a deposit of trust funds to the trustee's personal account. *Allen v. Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916; *Bank of Hickory v. McPherson*, 59 So. 934 (Miss.); *Boone County Bank v. Byrum*, 68 Ark. 71, 56 S. W. 532. An apparent conflict between the cases as to the bank's liability in the last instance may perhaps be explained by a consideration of the nature of the trust involved. In the case of an official trustee, as sheriff, commissioner, administrator, or guardian, the cases uniformly hold that mere notice to the bank that the fund deposited is held in trust will render it liable if harm results from an improper form of deposit. This is doubtless due to the fact that an official trustee never has a right to deposit the funds to his private account. But where the bank merely knows that the deposit consists of private trust funds, it cannot be held liable for permitting such a deposit, as by the terms of the trust the trustee may have the right to use that form of deposit. *Batchel-*

*der v. Central National Bank of Boston*, 188 Mass. 25, 73 N. E. 1024; *Ashton v. Atlantic Bank*, 3 Allen (Mass.) 217. Where the defendant knows, as it did in the principal case from the fact that he was a guardian, that the trustee has no authority to deposit to his personal account, it is properly held liable. *Duckett v. National Mechanics' Bank*, 86 Md. 400, 38 Atl. 983.

**BILLS AND NOTES — DEFENSES — INTOXICATION AND INSANITY.** — The defendant signed a note as accommodation co-maker while in a state of complete intoxication. *Held*, that a holder in due course cannot recover. *Green v. Gunsten*, 142 N. W. 261 (Wis.). See NOTES, p. 164.

**BILLS AND NOTES — RIGHTS OF HOLDER AGAINST GARNISHING CREDITOR OF DRAWER.** — A depositor drew a check on the R. bank, for a smaller amount than his deposit, in favor of the M. bank. Before M. sent the check to R. for payment, a creditor of the depositor garnished the R. bank and M. intervened. *Held*, that the intervener is entitled to the amount of the check from the deposit in the R. bank. *Farrington v. F. E. Fleming Commission Co.*, 142 N. W. 297 (Neb.).

A check against a specified account, or for the whole deposit, or when accompanied by an assignment agreement, has been held to be an equitable assignment *pro tanto* of the depositor's claim. *Fortier v. Delgado & Co.*, 122 Fed. 604; *Taylor's Estate*, 154 Pa. St. 183, 25 Atl. 1061; *Throop Grain Elevator Co. v. Smith*, 110 N. Y. 83. But these are only exceptions to the common-law principle accepted in the great majority of jurisdictions that a check is not an assignment, the payee having no more right against the drawee than on any other unaccepted bill of exchange. *Hopkinson v. Forster*, L. R. 19 Eq. 74; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324. A few states, including Nebraska, took the opposite view. *Fonner v. Smith*, 31 Neb. 107, 47 N. W. 632. If the check is not an assignment, the garnishing creditor of the depositor prevails against the holder of the check who has no claim upon the funds. *Dickenson v. Coates*, 79 Mo. 250; *Kuhn v. Warren Savings Bank*, 11 Atl. 440 (Pa.). The Negotiable Instruments Law, § 189, adopted in Nebraska, expressly provides that a check is not an assignment. Contrary to the principal case, Kentucky, which formerly held a check to be an assignment, has recognized that the adoption of this statute changed the old law. *Taylor's Adm'r v. Taylor's Assignees*, 78 Ky. 470; *Boswell v. Citizens Savings Bank*, 123 Ky. 485, 490, 96 S. W. 797, 799. The principal case follows the old minority view and is directly opposed to the express words of the Negotiable Instruments Law.

**CARRIERS — DISCRIMINATION AND OVERCHARGE — MISTAKE: LIABILITY FOR NEGLIGENCE FOR QUOTING TOO HIGH A RATE BY MISTAKE.** — A carrier quoted a rate to a shipper which by error was less than that published in accordance with sec. 6 of the Interstate Commerce Act. The shipper in reliance made a contract for the sale of certain cotton seed, and loaded it on cars. Later the carrier notified the shipper that a mistake had been made and quoted a new rate, which by a second mistake was higher than the published rate. The shipper refused to ship, but stated that he would have shipped at the correct rate and sued for lost profits. *Held*, that he may recover. *Aldrich v. Southern Ry. Co.*, 79 S. E. 316 (S. C.).

The case is unquestionably sound in holding the carrier liable for refusing to accept at a reasonable rate the shipment tendered to it. *Pickford v. Grand Junction Ry. Co.*, 8 M. & W. 372. The published rate is held legally to be the only reasonable one. *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350. The case, however, is made to depend solely on the actual tender of the goods, and recovery would have been denied if the shipper's remedy had been dependent merely on the negligence of the carrier.



There is a duty owed prospective as well as actual shippers to furnish correct information. This was probably true at common law. *Cf.* 1 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 367, 385. It is certainly true under the Interstate Commerce Act, §§ 6, 8, 9. If, however, the negligence results in the quotation of a rate lower than that published, it is impossible to save to the shipper his usual remedy, since it would enable him to get service at a discriminatory rate, thus militating against the integrity of the act. *Texas & P. Ry. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628; *Illinois Central R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 33 Sup. Ct. 176; *Poor Grain Co. v. Chicago, etc. Ry. Co.*, 12 I. C. C. Rep. 418, 421. See 22 HARV. L. REV. 58; 27 HARV. L. REV. 83. However, no such countervailing considerations affect the case where too high a rate is quoted. To grant the remedy does not result in discrimination. On the contrary, if no liability were incurred a higher rate would be continually quoted to unfavored shippers who practically must rely on the carriers' statement. Therefore it is submitted that the shipper should be allowed to recover for damage suffered by the carrier's negligence, even though he cannot show a substantial tender of the goods. Where there has been no tender, a question might arise as to the jurisdiction of the state court, particularly if it be held that the remedy of a prospective shipper did not exist at common law but arises by virtue of the Interstate Commerce Act. That there is such jurisdiction see *Robb v. Connolly*, 111 U. S. 624, 637, 4 Sup. Ct. 544; *Galveston, etc. R. Co. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205. *Contra*, *Van Patten v. Chicago, etc. R. Co.*, 74 Fed. 981. See 25 HARV. L. REV. 292.

CARRIERS — PASSENGERS — STANDARD OF CARE IN SALE OF TICKETS. — The plaintiff, an illiterate, showed the defendant's ticket agent a slip of paper, and asked for a ticket to the place named thereon. The agent gave him a ticket to a different place. *Held*, that the defendant in selling tickets is bound to use only ordinary care. *Texas & N. O. R. Co. v. Wiggins*, 156 S. W. 1131 (Tex. Ct. Civ. App.).

The highest degree of care is exacted of a common carrier of passengers as regards the construction and maintenance of his carrying equipment. *New Jersey R. Co. v. Kennard*, 21 Pa. St. 203. And the same standard of care is required in operating. *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291. This extraordinary care and diligence must also be used by the carrier in protecting passengers from injury by their fellow passengers. *Flint v. Norwich & N. Y. Trans. Co.*, 34 Conn. 554. This is equally true as to the provision of safe means for alighting from the train on arrival at stations. See *Mo. Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741. Before and after the actual carriage, the carrier should be held up to the duty of the highest degree of care to its passengers, with reference to the condition of its premises. *Gulf, C. & S. F. Ry. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583. *Contra*, *Moreland v. Boston & Prov. R. Corp.*, 141 Mass. 31; *Kelley v. Manhattan Ry. Co.*, 112 N. Y. 443. It has been laid down that the above test applies only to measures for the passenger's safety. But it has been applied as to the protection of his feelings as well. *Goddard v. Grand Trunk R.*, 57 Me. 202. Also in the transmission of telegrams, where obviously safety is not a consideration, the public service corporation has been subjected to this extreme liability. *Jones v. Western Union Tel. Co.*, 101 Tenn. 442, 47 S. W. 699. See *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 389. The cases show that this test is not limited to any particular branch of the carrier's activities. The carrier enjoys a monopoly, receives valuable privileges from the public and performs important and necessary services for it. On account of this relation, therefore, a greater liability has been imposed, from which, it is submitted, the carrier should not be exempt, in any special branch of his service, and that in selling tickets the highest degree of care should be exacted.

**CARRIERS — PERSONAL INJURIES TO PASSENGERS — JUSTIFICATION FOR ASSAULTS AND INSULTS BY SERVANTS.** — A passenger on a street car by abusive language provoked an assault from the defendant's motorman. *Held*, that the passenger cannot recover. *Binder v. Georgia Ry. & Electric Co.*, 79 S. E. 216.

The peculiar Georgia rule that insult is justification for assault brings into issue the question whether a justification to one of its servants as an individual will excuse a breach of public duty on the part of the company. For discussion see NOTES, p. 171.

**CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — EXTRATERRITORIAL VALIDITY OF DIVORCE GRANTED WITHOUT PERSONAL SERVICE.** — A deserted wife stayed in South Dakota long enough to establish a separate domicile by the law of that state and obtained there a decree of divorce without personal service on the husband. The defendant, having subsequently married her, was sued by her former husband for criminal conversation. *Held*, the plaintiff had a cause of action. *Berney v. Adriance*, 142 N. Y. Supp. 748.

A decree of divorce operates *in rem* on the status of the petitioner. *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544; *Ditson v. Ditson*, 4 R. I. 87. For this reason the great weight of authority is that personal jurisdiction over the defendant in a divorce action is not necessary. All that is necessary is sufficient notice of the suit. *Felt v. Felt*, 59 N. J. Eq. 606, 45 Atl. 105; *Ditson v. Ditson*, *supra*. New York, however, now with the backing of the United States Supreme Court, holds that it is not required by the "full faith and credit" clause of the Constitution to recognize as valid a decree of divorce rendered in another state than the domicile of matrimony, unless based on personal service. *Winston v. Winston*, 165 N. Y. 553, 59 N. E. 273; *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525. The South Dakota decree in the principal case being invalid from the point of view of New York, it therefore follows that the husband had existing marital rights infringed by the defendant. For a criticism of this theory see 19 HARV. L. REV. 586.

**CONFLICT OF LAWS — RECOGNITION OF FOREIGN JUDGMENTS — JUDGMENT AGAINST CO-RESPONDENT BASED ON CONSTRUCTIVE SERVICE.** — The plaintiff brought divorce proceedings in India, the *situs* of the marriage, and under a statute joined the defendant as co-respondent. The defendant, an English subject, and domiciled in England, had left India before the suit was brought, the writ being served on him in England by registered post, according to the requirements of the Indian statute. The divorce was granted, and at the same time judgment for a large sum of money was entered against the defendant. The plaintiff brought suit on this judgment in England. *Held*, that he may recover. *Phillips v. Batho*, [1913] 3 K. B. 25.

At common law the courts of one jurisdiction will enforce judgments obtained in foreign jurisdictions when the judgment has imposed a valid obligation on the defendant. Except where there has been express or implied consent to the foreign jurisdiction, a judgment does not usually create a valid personal obligation in the absence of personal service within the jurisdiction even though the foreign laws as to constructive service are complied with. *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670; *McEwan v. Zimmer*, 38 Mich. 765. The obligation, however, is valid in such a case if the defendant was a subject of the foreign sovereign, *Douglas v. Forrest*, 4 Bing. 686; or probably if he was domiciled there. *Henderson v. Staniford*, 105 Mass. 504; *Hunt v. Hunt*, 72 N. Y. 217. Judgment in actions *in rem* may be binding as to the disposition of the *res* without personal service on the defendant when rendered by a court of a sovereign within whose territory the *res* lies. *The Belgenland*, 114 U. S. 355. Judgments for divorce rendered at the *situs* of the marriage



are usually held valid without personal service. *Loker v. Gerald*, 157 Mass. 42, 31 N. E. 709. *Doerr v. Forsythe*, 50 Ohio St. 726, 35 N. E. 1055. However, actions arising out of an interference with a *res*, resting on a personal duty to make reparation, are clearly actions *in personam*. Accordingly suits for trespass to realty are personal actions. Likewise suits for alimony, even when ancillary to divorce proceedings, are treated as purely personal actions. *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405. In the principal case it would seem that a suit in India against a co-respondent was of the same nature, and that the Indian court could not impose a binding obligation upon the defendant. It seems hard to support the decision on the ground that the defendant as an English subject was, because of his allegiance, under an obligation to obey the Indian laws as to service. Ordinarily the different parts of the British empire are looked upon as distinct foreign jurisdictions. *Emmanuel v. Symon*, [1908] 1 K. B. 302. And there seems no reason to say that the English sovereign has commanded his subjects to obey the laws of a separate part of the empire even if the English court does not afford relief against co-respondents except those who offend against English marriages.

CONTEMPT — ACTS AND CONDUCT CONSTITUTING CONTEMPT — AVOIDING SUBPÆNA. — A witness, expecting to be subpoenaed, but before issue, concealed himself. Held, that he is guilty of contempt. *Aaron v. State*, 62 So. 419 (Miss.).

A defendant attempted to persuade one wanted as a witness to avoid service of the subpoena. Held, that he is guilty of a misdemeanor. *Rex v. Carroll*, [1913] Vict. L. R. 380.

For a discussion of the important bearing on every-day practice of the principles involved in these cases, see NOTES, p. 165.

CONTRACTS — DEFENSES — IMPOSSIBILITY — DESTRUCTION OF CONTEMPLATED MEANS OF PERFORMANCE. — The defendant contracted to sell onions to the plaintiff, "shipment per P. & O. steamer sailing from Japan about the 8th of September and coming direct to Sydney." No such steamer sailed due to the fault of neither party. The plaintiff, refusing to accept delivery by any other route, sued for failure to deliver according to the terms of the contract. Held, that the plaintiff may not recover. *Cornish & Co. v. Kanematsu*, 13 New South Wales, 83.

Ordinarily a party will not be excused from performance of a contract merely because it has become impossible. *Paradine v. Jane*, Aleyn 26; *Rowe v. Peabody*, 207 Mass. 226, 93 N. E. 604. But it is well settled that where performance of the contract depends upon the continued existence of the subject matter, in the absence of any warranty by either party that it shall continue to exist, the destruction of the subject matter without the fault of either party will excuse further performance. *Taylor v. Caldwell*, 3 B. & S. 826; *Martin Emerich, etc. Co. v. Siegel, Cooper & Co.*, 237 Ill. 610, 86 N. E. 1104. The principle of this rule has been extended to cases in which the impossibility arises from the failure of the contemplated means of performance. *Nickoll & Knight v. Ashton, Eldredge & Co.*, [1901] 2 K. B. 126; *Clarksville Land Co. v. Harri-man*, 68 N. H. 374, 44 Atl. 527. In the principal case the court bases its decision upon the ground of impossibility of performance. But the case is closely analogous to cases of goods sold "to arrive," in which the words "to arrive" are construed as a condition precedent to the liability of either party under the contract, although the words in the principal case do not so clearly constitute a condition precedent as they do in the "to arrive" cases. *Johnson v. MacDonald*, 9 M. & W. 600; *Rogers v. Woodruff*, 23 Oh. St. 632. The two doctrines rest upon a similar principle, that neither party should be held liable for the failure of that which was, in the contemplation of the parties, the basis of the contract, and the continued existence of which he did not warrant. See 19 HARV. L. REV. 462.

CONTRACTS — SUIT BY THIRD PERSONS NOT PARTIES TO CONTRACT — PROMISE TO DISCHARGE OBLIGATION OF PROMISEE — INDIAN LAW. — In consideration of the conveyance of property, the defendant promised a debtor to discharge his obligation to a creditor. The creditor brought suit on this promise, joining the original obligor as defendant, and asked a decree against the promisor for the amount of the debt. *Held*, that the plaintiff is entitled to the relief sought. *Dutt v. Mondol*, 17 Calcutta Weekly Notes 1143 (India Civ. App. Jur., June, 1913).

Most American jurisdictions, following the famous case of *Lawrence v. Fox* (20 N. Y. 268), allow a creditor whose debtor has been given a promise to pay the debt a direct action at law against the promisor. *Meyer v. Lowell*, 44 Mo. 328; *Wood v. Moriarty*, 15 R. I. 518. *Contra*, *Borden v. Boardman*, 157 Mass. 410, 32 N. E. 469. A few courts appreciate more clearly the basis of the creditor's interest and give relief only by suit in equity to reach and apply the debtor's right against the promisor in satisfaction of the creditor's claim. *Forbes v. Thorpe*, 209 Mass. 570, 95 N. E. 955. See article by Prof. Williston, 15 HARV. L. REV. 775 *et seq.* In England, however, no one but the promisee may enforce the promise, at law or in equity. *Price v. Easton*, 4 B. & Ad. 433. *Cf. Re Empress Engineering Co.*, 16 Ch. D. 125. The radical departure of the principal case from the settled English law does not arise from the Indian rule that consideration need not move from the promisee. See POLLOCK, INDIAN CONTRACT ACT, 3 ed., p. 19; 15 HARV. L. REV. 771. It is rather an instance of the general tendency of the modern law to give direct relief to third persons interested in the performance of a contract when such is the intent of the parties. The civil law generally permits recovery by a beneficiary. See 16 HARV. L. REV. 43. Even the English law has lost some of its rigidity by improperly extending its conception of a trust. *Cf. Moore v. Darton*, 4 DeG. & Sm. 517. The recognition in India of the substantial justice of the prevailing American view is, therefore, in harmony with the trend of legal development.

CRIMINAL LAW — FORMER JEOPARDY — PERJURY — DIFFERENT FALSEHOODS IN SAME PROCEEDING UNDER SAME OATH. — The defendant was indicted for perjury. He had previously been acquitted on a charge of perjury, based on another and different falsehood under the same oath in the same proceeding. *Held*, that the previous trial constitutes former jeopardy. *Black v. State*, 79 S. E. 173 (Ga. Ct. App.).

The precise point seems never to have arisen before. Perjury is committed when one who has taken oath to testify to the truth in a judicial proceeding knowingly makes a false statement material to an issue in that proceeding. See *People v. Fox*, 25 Mich. 492, 496; *Herring v. State*, 119 Ga. 709, 715, 46 S. E. 876, 879; STEPHEN, CRIM. LAW DIG., 4 ed., p. 95; 4 BL. COM. 137. It might be deduced from this that each false assertion constitutes a separate crime, and that the principal case is erroneously decided. But it is universally held that a single count of indictment containing several assignments of perjury under one oath is not bad. *State v. Bishop*, 1 D. Chipm. (Vt.) 120; *State v. Bordeaux*, 93 N. C. 560; *Commonwealth v. Johns*, 6 Gray (Mass.) 274. Also that a count of indictment containing charges of more than one crime is bad for duplicity. *State v. Dennison*, 60 Neb. 192, 82 N. W. 628; *Commonwealth v. Symonds*, 2 Mass. 162; *State v. Temple*, 38 Vt. 37. It follows therefore that various false statements under one oath constitute but one crime. See *State v. Bishop*, *supra*, p. 123. This supports the reasoning of the principal case to the effect that violation of the oath is the gist of the offense, and the several falsehoods only so many several means to a single criminal result. The defendant is therefore clearly within the constitutional guaranty.

FRAUDULENT CONVEYANCES — WHAT CONSTITUTES FRAUD — RIGHTS OF CREDITORS — PERSONAL RIGHTS AGAINST TRANSFEREE. — A debtor trans-



ferred stock to the defendant, one of his creditors, not to be applied on the debt but to assist in placing it beyond the reach of other creditors. Land was transferred to the debtor's wife, another defendant, who had no knowledge of the fraud. The stock, which was worth five times par when transferred, became worthless while held by the defendant. The land held by the wife was sold in foreclosure and she now holds none of the proceeds. The plaintiff, a judgment creditor, seeks to set the transfer aside and recover personal judgment as well. *Held*, that the defendant who participated in the fraud is liable for the value of the property transferred, but the *bona fide* donee is not. *Koellhoffer v. Peterson*, 143 N. Y. Supp. 353 (Sup. Ct.).

Where property is not taken for the debt, but to enable the debtor to defraud creditors, the existence of a *bona fide* obligation will not save the transaction. *Smith v. Schwed*, 9 Fed. 483. When one secures the legal title to property in violation of the rights of another, he becomes a constructive trustee for the person equitably entitled. See 3 POMEROY EQ. JUR., 3 ed., § 1053. Whether the true owner was deprived of his property by fraud, by theft, or by any other wrongful method is immaterial. *National Mahaiwe Bank v. Barry*, 125 Mass. 20; *Humphreys v. Butler*, 51 Ark. 351. So a grantee of a fraudulent conveyance has been called a constructive trustee for the grantor's creditors. *Doherty v. Holliday*, 137 Ind. 282, 288, 32 N. E. 315, 317. This is not strictly accurate, because a creditor cannot be said to have an equity in a debtor's property. But such a grantee commits a wrong in confederating with the debtor to place the property where the creditors cannot get at it to satisfy their claims. It is just that this conscious wrongdoer should not be allowed to profit by his wrong. The rules governing the reparation of this wrong are similar to those where there is a true constructive trust. If the property or its proceeds increase in value, the grantor's creditors reap the benefit. *Gillett v. Bate*, 86 N. Y. 87. If the fraudulent grantee sells the property, he is liable for its full value, no matter what he got. *Post v. Stiger*, 29 N. J. Eq. 554. Where some of the property has been stolen while in his possession, he must make good the loss. *Hargreaves v. Tennis*, 63 Neb. 356, 88 N. W. 486. In the principal case, therefore, the imposing of personal responsibility upon the fraudulent grantee seems just in view of the wrong done. No personal judgment, however, should be given against an innocent donee. Such a donee's conscience can only be affected when knowledge comes to him that in holding the property he is depriving another of some right. If the money has been spent or disposed of in such a way that no proceeds remain, he is not personally liable. *Truesdell v. Bourke*, 29 N. Y. App. 95, 51 N. Y. Supp. 409; *Bonesteel v. Bonesteel*, 30 Wis. 516. The result is the same where the property is returned to the grantor. *Norris v. Jones*, 93 Va. 176, 24 S. E. 911; *Wheeler v. Kirtland*, 23 N. J. Eq. 13. Since the wife was innocent and neither property nor proceeds remained, the decision denying personal liability seems also correct.

INFANTS — ADOPTION — REQUISITES OF ABROGATION. — With the consent of the natural parents, a child was adopted by another couple, according to statutory requirements. Later this adoption was abrogated according to statute, without the consent of the natural mother, who had meanwhile been divorced. One of the adoptive parents having died leaving a large estate, the child now seeks annulment of this abrogation, on the ground that the mother did not consent. *Held*, that the abrogation is valid. *Matter of Ziegler*, 50 N. Y. L. J. 99 (N. Y. Surr. Ct., Oct., 1913).

Adoption is governed by the requirements of the statute in force, not being known at common law. The statute referred to in the principal case provides that an adoption may be abrogated by a decree, on the consent of those parties whose consent would be necessary to an adoption. 1 CONSOL. LAWS, N. Y. 1079. The New York statute, in common with the statutes of Massachusetts,

Maine, and Iowa, provides that the consent of a divorced parent is not requisite to an adoption. See STIMSON, AMERICAN STATUTE LAW, § 6642. The abrogation is valid, therefore, on the statute. The case is interesting as bringing out clearly that the effect of the statute is to create a status, rather than a contractual relation. The relation of parent and child is a status, and by adoption a status is created which approximates this relation. See *Sewall v. Roberts*, 115 Mass. 262, 276. The tendency of what cases there are on abrogation of adoption has been to minimize the importance of consent of the parties. Unless required by statute, consent of the natural parents is not necessary to adoption. *Clarkson v. Halton*, 143 Mo. 47, 54. It must follow that consent would not be essential to an abrogation under such a statute.

INTERSTATE COMMERCE — CONTROL BY STATES — RAILROAD REGULATION: EFFECT OF CARMACK AMENDMENT ON STATE STATUTE REQUIRING CARRIERS TO TRACE SHIPMENTS. — A state statute required any carrier, whether initial, intermediate, or terminal, over whose line goods were routed to trace the goods and ascertain on which carrier's line they had been lost or damaged, and report to the shipper within forty days from the time demand was made. For failure so to report it made the carrier liable for the full amount of the damage to the goods, and in addition a penalty of fifty dollars; provided that if the carrier could show that by the exercise of due diligence the information could not be acquired then the carrier should be discharged. The shipper sued the terminal carrier. *Held*, that the statute is constitutional and is not affected by the Carmack Amendment. *Du Pre v. Columbia, etc. R. Co.*, 79 S. E. 310 (S. C.).

A statute similar to this was held constitutional before the passage of the Carmack Amendment on the ground that it fell within that class of legislation where the jurisdiction of the state is concurrent with the federal government in aid of interstate commerce, until Congress has acted. *Skipper v. Seaboard, etc. Ry.*, 75 S. C. 276, 55 S. E. 454, 7 L. R. A. N. S. 388 and note, s. c. 20 HARV. L. REV. 420. *Cf. Atlantic, etc. R. Co. v. Mazursky*, 216 U. S. 122, 30 Sup. Ct. 378; *Chicago, etc. Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289. But *cf. Central of Georgia R. Co. v. Murphey*, 196 U. S. 194, 25 Sup. Ct. 218; *Venning v. Atlantic C. L. R. Co.*, 78 S. C. 42, 58 S. E. 983. See note to *Atlantic C. L. R. Co. v. Riverside Mills*, 55 L. Ed. 167. Although it may be urged that the decisions have gone too far in allowing a state to regulate commerce where one uniform system is possible, it seems clear that in the absence of the Carmack Amendment the statute under discussion would have been held constitutional. The question now arises whether this field is covered by the Carmack Amendment which makes the initial carrier liable to the shipper for damage to or loss of goods shipped, but provides that this shall not deprive the shipper of any remedy which he had under the existing law. Amendment, June 29, 1906, c. 3591, § 7, 34 STAT. AT LARGE, 595, to Interstate Commerce Act, Feb. 4, 1887, c. 104, § 20, 24 STAT. AT LARGE, 386. This amendment certainly exhibits an intention on the part of Congress to take control of the entire situation and to make the remedies of the shipper against the carrier uniform throughout the United States. *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164; *Galveston, etc. R. Co. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, s. c. discussed in 26 HARV. L. REV. 456. Under it a state statute prohibiting a railroad from limiting its liability is held to be superseded. *Adams Express Co. v. Croninger, supra*. The statute in the principal case is held inoperative so far as it applies to initial carriers. *Meete v. Southern Express Co.*, 91 S. C. 379, 74 S. E. 823. However, whatever else the proviso in the Carmack Amendment may mean, it would seem to preserve the shipper's remedy against the particular carrier guilty of the wrong. The statute



here makes that right effective. On the whole, then, it would seem that the liability of the terminal carrier under this statute is not affected by the Carmack Amendment, and that the intention of Congress to exclude the state in regard to this right is not sufficiently clear.

**INTOXICATING LIQUORS — SALES — ORDER BY FRIEND WITHIN PROHIBITED TERRITORY.** — The defendant, at the request of a neighbor, ordered a quantity of beer to be shipped into a dry county, paying for it himself and delivering it upon its arrival to the neighbor, who repaid him. The defendant had no interest in the beer or profit from the enterprise. He was indicted under a local option law making it an offense "to sell, give away, or furnish" intoxicating liquors to anyone in the local-option area. *Held*, that the defendant may not be convicted. *People v. Driver*, 20 Detroit Legal News 17 (Mich. Sup. Ct., March 20, 1913).

One may order liquor shipped to him from outside a local-option area without violating the statute. In the absence of evidence of a contrary intention by the parties, delivery of the goods by the seller to a common carrier for shipment to the buyer transfers title and completes the sale. *Badische Anilin und Soda Fabrick v. Basle Chemical Works*, [1898] A. C. 200. Hence there is no sale in the prohibited territory. *Frank v. Hoey*, 128 Mass. 263; *State v. Wingfield*, 115 Mo. 428, 22 S. W. 363; *Harding v. State*, 65 Neb. 238, 91 N. W. 194. There is also no furnishing in the dry county (*Southern Express Co. v. State*, 107 Ga. 670, 33 S. E. 637), for title has already passed to the purchaser and one cannot "furnish" the owner with his own goods. What one may do himself he may do by an agent, and a sale to the agent is a sale to the principal. So where one acts merely as agent for another in purchasing liquor outside the local-option area and delivering it to his principal, he is not guilty of any act of sale within the county, although he advances his own money and is afterwards repaid by the principal. *Whitmore v. State*, 72 Ark. 14, 77 S. W. 598; *State v. Allen*, 161 N. C. 226, 75 S. E. 1082; *People v. Tart*, 169 Mich. 586, 135 N. W. 307. The principal case is but an application of the above principles. The agent must act, however, *bona fide* as agent for the buyer and not the seller, and without interest in the liquor, or profit from the sale. *State v. Gross*, 76 N. H. 304, 82 Atl. 533; *People v. Tart*, *supra*. See 11 HARV. L. REV. 468; 13 HARV. L. REV. 609.

**JURY — VENIRE: MOTION TO QUASH — DISCRIMINATION AGAINST NEGROES — CONSTITUTIONAL LAW.** — Jury commissioners in making up a general venire of three hundred citizens for jury service in a county in Louisiana selected only white men, although about one quarter of the community was negro. The defendant, a negro, moved to quash the general venire. *Held*, that the motion was correctly overruled. *State v. Turner*, 63 So. 169 (La.).

This method of selecting a venire has been uniformly upheld unless it has been affirmatively proved by the appellant that actual discrimination on the ground of color took place. *State v. West*, 40 So. 920, 116 La. 626; *Miller v. Commonwealth*, 127 Ky. 387, 105 S. W. 899. On a motion to quash, the burden of proof is normally on the person asking relief, but the difficulty of affirmatively showing actual discrimination in this class of cases is so great that the suggestion of Mr. Justice Harlan to the effect that where, in a community having a large proportion of negroes, it is shown that the venire is by custom composed exclusively of whites, a *prima facie* case for discrimination should be raised, seems worthy of consideration. *Neal v. Delaware*, 103 U. S. 370. But on the other hand one may argue, as did the court in the principal case, that the jury commissioners, all of whom were white, were probably not discriminating against the negroes, but were of necessity confined to the selection of whites since the law required that they should select for service on the jury

men they personally knew to be "competent" for service and "good and true." The question of the defendant's constitutional right under the Fourteenth Amendment was not raised in the principal case, but it often is where similar facts are involved. See 17 HARV. L. REV. 351.

**MUNICIPAL CORPORATIONS — GOVERNMENTAL POWERS AND FUNCTIONS — RIGHT TO AMUSE CITIZENS.** — An ordinance passed by the municipal council of the city of Toledo ordered a transfer of one thousand dollars to the department of public service for the establishment of a municipal moving-picture theatre. The city auditor refusing to make the transfer, a proceeding in mandamus was brought against him. *Held*, that the writ of mandamus be denied. *State ex rel. City of Toledo v. Lynch*, 102 N. E. 670 (Oh.). See NOTES, p. 162.

**OFFER AND ACCEPTANCE — REWARD — UNILATERAL CONTRACTS.** — A reward is offered for the arrest and conviction of a criminal. A. gives information that leads the authorities to B. and C. who identify the criminal. He is arrested and confesses. The offeree pays the money into court and files a bill of interpleader. *Held*, that the reward be equitably divided between A., B., and C. *Bloomfield v. Maloney et al.*, 20 Detroit Leg. N. 700 (Sup. Ct., Mich., July 18, 1913).

An offer of a reward is an offer to a unilateral contract, to be accepted by performance. It follows that the general principles of the law of contracts apply, and that this performance must comply with the terms of the offer. *Williams v. West Chicago St. R. R. Co.*, 191 Ill. 610. Performance of only part of what is asked for, cannot entitle one to any part of the reward. *Furman v. Parke*, 21 N. J. L. 310; *Hogan v. Stophlet*, 179 Ill. 150, 63 N. E. 604. Similarly if the result asked for has been accomplished, but by the efforts of several people acting independently, each of whom performs only a part, no one of them can claim to have fulfilled the conditions of the offer, and consequently the reward has not been earned. If, however, these people had coöperated in a partnership, the reward would fairly be earned by that partnership for distribution among its members. *Kinn v. First Nat. Bank of Mineral Point*, 118 Wis. 537, 95 N. W. 969. Although is not absolutely clear from the report of the principal case, it seems that the claimants acted independently, and if this view of the facts is correct the case cannot be supported.

**POST-OFFICE — WHETHER GOVERNMENT CAN SUE AS BAILEE OF OWNER FOR CONVERSION OF MAIL — EFFECT OF OWNER'S FRAUD.** — The defendant was under contract to carry for the plaintiff (the United States) such foreign and domestic mail as was delivered to it in accordance with the acts of Congress and the regulations of the Post-Office Department. A package of jewelry having a salable value, which was mailed in France and addressed to Havana, via the United States, was lost owing to the defendant's negligence. The postal convention between the plaintiff and the French Republic prohibits the transmission by mail into the United States of any merchandise having a salable value. The Postmaster-General imposed a fine upon the defendant, in accordance with the statute providing such a penalty for delinquencies in the mail service, but the amount of the fine was not determined by the value of the lost articles. Act June 8, 1872, c. 335, § 266, 17 STAT. AT LARGE, 316. This action for the value of the jewelry is brought by the United States as bailee of the owner. *Held*, that the plaintiff cannot recover. *United States v. Atlantic Coast Line R. Co.*, 206 Fed. 190 (Dist. Ct., E. D. N. C.).

Where a railroad carries mails for the government its liability to the government depends upon the special contract between it and the government. *Atchi-*



*son, T. & S. F. Ry. Co. v. United States*, 225 U. S. 640. The court's inference that the summary power of imposing a fine, conferred upon the Postmaster-General by statute, was intended to preclude any recovery under the contract seems unjustified. It is a privilege accorded the Post-Office Department for the promotion of efficient service, and the penalty assessed is a liquidation of damages for the public inconvenience. See *Otis v. United States*, 24 Ct. Cl. 61, 72; *Parker v. United States*, 26 Ct. Cl. 344, 358. No provision of the statute can be construed as impairing the right of a bailee to recover for the owner's benefit from a converter, even where the conversion involves no wrong for which the bailee would himself be liable before such recovery. *The Winkfield*, [1902] P. 42. But the principal case may well constitute an exception to what, it is submitted, should be the general rule, for the illegal use of the mails by the party for whose benefit the action is brought is a fraud which should vitiate the right of the nominal plaintiff. *Gibson v. Paynter*, 4 Burr. 2298; *Orange Co. Bank v. Brown*, 9 Wendell (N. Y.) 85.

**PROFITS À PRENDRE — RIGHT TO SELF-HELP.** — The defendants had a right to cut heather on the plaintiff's estate. When the land became thickly grown with small trees so as to interfere with gathering the heather, they entered and began cutting down the trees. The plaintiff asked that they be restrained. *Held*, that the defendants be enjoined from further cutting. *Hope v. Osborne*, 77 J. P. 317 (Ch. Div.).

It is uncertain how far the holder of a *profit à prendre* may protect his interest by self-help. One whose property rights have been invaded may certainly in some cases take the law into his own hands, provided the amount of force used is reasonable. The victim of a private nuisance may enter upon the offender's land and forcibly abate it. *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *Roberts v. Rose*, L. R. 1 Exch. 82. But if the land owner was not the original wrongdoer, notice must be given first, except in emergencies. *Jones v. Williams*, 11 M. & W. 176. The owner of a chattel which is wrongfully being detained from him may in general enter and retake it. *Madden v. Brown*, 8 N. Y. App. Div. 454, 40 N. Y. Supp. 714. But he may not enter upon the land of one who is not responsible for the chattel's being there, as where a former tenant is claiming a chattel that he left behind. *Anthony v. Haney*, 8 Bing. 186. The holder of an easement may remove any obstruction placed upon it by the owner of the servient tenement without making a prior request. *Quintard v. Bishop*, 29 Conn. 366. But if it was put there by a stranger or by the grantor of the servient owner, notice must be given. *O'Shaughnessy v. O'Rourke*, 36 Misc. (N. Y.) 518, 73 N. Y. Supp. 1070. Lord Coke indicated that the holder of a *profit à prendre* was justified in breaking down any serious obstruction erected by the land owner. 2 Inst. 88. So it has been held that where the lord has planted hedges a commoner may pull them up. *Mason v. Caesar*, 2 Mod. 65. But on the analogy of the above cases it would seem that where the landowner, as in the principal case, has been guilty of no misfeasance, but merely of a failure to do something, the holder of a *profit à prendre* should not have self-help; certainly not without prior request. Where affirmative duties are involved it would seem safer to leave all remedy to the courts.

**SALES — BILL OF LADING — CARRIER'S LIABILITY UNDER AN "ORDER" BILL — FORGED BILL.** — A seller, delivering two carloads of beans to the carrier, took "order" bills of lading on which the buyer was named as both consignor and consignee. By express stipulation in the bills their surrender was to be a prerequisite to delivery of the goods by the carrier. The seller retained possession of the bills as security for the price. The buyer forged other bills, indorsed them in blank, and sold them to a third person who secured delivery

on them from the defendant carrier. *Held*, that the carrier is not liable to the seller. *Nelson Grain Co. v. Ann Arbor R.*, 140 N. W. 486 (Mich.).

That a "straight" bill is nothing more than a contract under which delivery can be made without taking up the bill may be true. *Singer v. Merchants', etc. Co.*, 191 Mass. 449, 77 N. E. 882. But an "order" bill of lading by its form and frequently by express stipulation represents that it is an indispensable key to the delivery of the goods by the carrier. *Goepel v. Hamburg, etc. Co.*, 191 Fed. 744; *Forbes v. Railroad*, 133 Mass. 154. When the consignee of an "order" bill of lading, having possession of it, secures delivery of the goods without surrendering the bill, a subsequent holder of the indorsed bill can hold the carrier for conversion. *Ratzer v. Burlington, etc. R.*, 64 Minn. 245, 66 N. W. 988; *Chesapeake S. S. Co. v. Merchants' National Bank*, 102 Md. 589, 63 Atl. 113. *Cf. Ridgway Grain Co. v. Penna. R.*, 228 Pa. 641, 77 Atl. 1007. By general custom bills may be made out to the order of the buyer and possession of the bills retained by the seller or his agent for the purpose of preventing delivery till the price is paid. See WILLISTON, SALES, § 285. In the principal case, however, the court argues that the carrier had no notice of the right or desire on the part of the plaintiff to prevent delivery, since he was not even named on the bill of lading as consignor. Such an argument might apply to a shipment under a "straight" bill of lading. Its use here fails to observe the essential difference between "straight" and "order" bills which has been pointed out. If, under all circumstances, the courts would require the carrier to take up the "order" bill before delivering the goods, less confusion would result, and a valuable mercantile custom would be recognized and effective. The Uniform Sales Act, recently adopted by Michigan, accentuates the distinction contended for. UNIFORM SALES ACT, § 20 (2 and 3). See WILLISTON, SALES, § 281 ff. In accord with the principal case: *St. Louis, etc. R. v. Gilbreath*, 144 S. W. 1051 (Tex.). For further discussion of the distinction between "straight" and "order" bills of lading see 22 HARV. L. REV. 534; 23 HARV. L. REV. 146.

SALES — SALE OF GOODS ACT — NOTICE OF SHIPMENT BY SEA. — The plaintiff sold goods to the defendant F. O. B. Antwerp, the shipping point. The Sale of Goods Act, § 32 (3), provides that "unless otherwise agreed, where goods are sent by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as will enable him to insure, and if he fails, the goods shall be at his risk." No notice was given. The goods were lost uninsured, and an action is brought relying upon this section. *Held*, that the section had no application to F. O. B. sales. *Wimble v. Rosenberg*, 57 Sol. J. 392, 784 (K. B. Div.; aff'd Ct. App., July, 1913).

This section of the English Sale of Goods Act, followed in the American Uniform Sales Act, § 46 (3), is foreign to the common law, being adopted from the Scotch law, where the rule has long been well settled. *Arnot v. Stewart*, 6 Paton App. Cas. 289; *Fleet v. Morrison*, 16 Sess. Cas. 1122. Prior to this case there had been no English or American decision on this section. The present case seems incorrect. No reason appears for excepting F. O. B. sales from the requirements of the section. On the contrary, F. O. B. sales are the very kind in which notice is required; for in the other two kinds of sales common in England, where sea transit is involved, "C. I. F." sales (where the price covers the cost, freight, and insurance), and "ex ship" sales (where the ship is named), obviously notice is immaterial. Moreover, a sale F. O. B. place of shipment is equivalent to an ordinary shipment. To except such a sale from the section is practically cancelling the section. The requirement of notice is reasonable. Title has passed to the buyer, and he should be given the opportunity to insure the goods. The aversion shared in by many courts to recognizing that a statute changes the common law seems here to have been carried to extreme lengths.



**STATUTES—INTERPRETATION — STATUTE ALLOWING JURY TO ASSESS PUNISHMENT.** — A statute authorized the jury in bringing in their verdict to inflict the death penalty in a trial for rape, although the court on its own initiative could not pronounce so heavy a sentence. The defendant pleaded guilty to secure the lighter penalty but was forced by the court to stand trial. *Held*, that the ruling was correct for otherwise a jury trial would be denied the defendant. *United States v. Green*, 41 Wash. L. Rep. 216 (Dist. Col.).

For a comment upon this case see this issue of the REVIEW, at p. 169.

**SUNDAY LAWS — VALIDITY OF CONTRACT EXECUTED ON SUNDAY — SUBSEQUENT PROMISE TO PAY.** — The defendant hired an automobile from the plaintiff on a Sunday for the purpose, as the court puts it, of "joy riding." This was in violation of the Sunday law. On a subsequent secular day the defendant promised to pay the plaintiff for the ride. *Held*, that the plaintiff cannot recover. *Jones v. Belle Isle*, 79 S. E. 357 (Ga.).

The asserted policy of the law against contracts made on Sunday forbids the enforcement of such agreements by the courts. *Riddle v. Keller*, 61 N. J. Eq. 513, 48 Atl. 818; *Day v. McAllister*, 15 Gray (Mass.) 433. The illegality of Sunday contracts, however, is not so serious that the parties lose all legal remedies. *Adams v. Gay*, 19 Vt. 358. If the agreement is wholly executory, the parties may disregard it completely and on a week day adopt its terms in a new contract. *Miles v. Jamrin*, 200 Mass. 514, 86 N. E. 785. Furthermore, if property has been transferred on Sunday without consideration, to prevent unjust enrichment the law gives the vendor the right to repudiate the whole transaction and obtain restitution of his property. *Tucker v. Mowrey*, 12 Mich. 378; *Ladd v. Rogers*, 11 Allen (Mass.) 209. *Contra*, *Chestnut v. Harbaugh*, 78 Pa. 473. If on a secular day the contract is adopted, then, since the vendor thereby surrenders his right to restitution, there is sufficient consideration to support the new promise by the transferee. *Williams v. Paul*, 6 Bing. 653, 4 M. & P. 532; *Sayles v. Wellman*, 10 R. I. 465; *Brewster v. Banta*, 66 N. J. L. 367, 49 Atl. 718. But where restitution is impossible by reason of the nature of the performance rendered, as in the principal case, repudiation accomplishes nothing. The policy of the law, moreover, forbids quasi-contractual liability, since it tends to enforce the unlawful agreement. Therefore the new promise in such a case lacks consideration. As the policy of the law also prevents its operation as a ratification of the original transaction, the principal case seems correct. *Pope v. Linn*, 50 Me. 83. Many authorities, it is true, appear to sanction ratification, but it is submitted that in reality their doctrine conforms to the analysis indicated above.

**TORTS — NATURE OF TORT LIABILITY IN GENERAL — LIABILITY WITHOUT NEGLIGENCE — BLASTING.** — The defendant in doing railroad construction work exploded a blast, the vibrations from which destroyed the plaintiff's well. The defendant had not been negligent. *Held*, that the plaintiff may recover. *Patrick v. Smith*, 134 Pac. 1076 (Cal.).

This case is opposed to American authority which holds that, in the absence of negligence, the plaintiff cannot recover when damage is caused by the vibrations from blasting. *Derrick v. Kelley*, 136 N. Y. App. Div. 433, 120 N. Y. Supp. 996; *Booth v. Rome, Watertown & O. T. R. Co.*, 140 N. Y. 267, 35 N. E. 592. When, however, the damage is due to débris thrown on the plaintiff's land, the weight of authority is that liability is absolute. *Hay v. Cohoes Co.*, 2 N. Y. 159; *Langhorne v. Turman*, 141 Ky. 809, 133 S. W. 1008. This latter class of cases is explained by the fact that there is a technical trespass. There seems, however, little distinction between setting a force in motion, knowing it will project rocks through the air, and knowing it will project vibrations through the earth and air. *Hickey v. McCabe*, 30 R. I. 346, 75 Atl. 404; *Colton v.*

*Onderdonk*, 69 Cal. 155, 10 Pac. 395. There seems no sufficient reason for distinguishing these two classes of cases, and the law should either treat blasting as an action at peril and give a recovery in both, or it should deny it in both and only apply the test of negligence aided by the doctrine of *res ipsa loquitur*. Probably the reason for the distinction is that the courts have felt themselves fettered by precedent in the case of the technical trespass, and yet have been unwilling to extend the doctrine to the vibration cases.

TRADE MARKS AND TRADE NAMES — MARKS AND NAMES SUBJECT OF OWNERSHIP — NAME OF A PATENTED ARTICLE. — The complainant, since 1886 under sole rights to American sales, had been selling a hair brush made in England and patented in both England and America. Upon the articles sold by the complainant was stamped, "Ideal Brush, London, patented." In 1903 the patent expired. In 1905 the complainant registered the mark. The defendant recently began selling the same brushes under the name "Ideal." *Held*, that the defendant be restrained from using this name. *Hughes v. Alfred H. Smith Co.*, 205 Fed. 302.

Words descriptive of the article or its quality are not susceptible of appropriation as trade marks. *Raggett v. Findlater*, L. R. 17 Eq. 29; *Computing Scales Co. v. Standard, etc. Co.*, 118 Fed. 965. "Ideal," while near the line, is probably not descriptive. *Waterman v. Shipman*, 130 N. Y. 301, 29 N. E. 111. It is held, however, that a non-descriptive word, otherwise the subject of exclusive appropriation, becomes *publici juris* when applied to a patented article, and dies with the patent if the mark has come to signify the goods rather than their maker. *Wheeler & Wilson Co. v. Shakspear*, 39 L. J. Ch. 36; *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169. It is a question of fact in each case whether the name attaches to the article or to the manufacturer. *Cf. Singer Manufacturing Co. v. Wilson*, 3 A. C. 376, with *Singer Manufacturing Co. v. Loog*, 8 A. C. 15. But the courts, by regularly interpreting the facts to show that the name designates the article only, have practically reached a rule of law that the name dies with the patent. A reason of policy given is that otherwise the patentee would perpetuate a monopoly. *Dover Stamping Co. v. Fellows*, 163 Mass. 191, 40 N. E. 105. Two elements seem to enter into forming this monopoly: the business ability of the maker in establishing the name, and the past aid of the patent in preventing the rise of competing names. What the patentee built up from the first factor should certainly be protected; and what he enjoys from the second could usually be overthrown at the expiration of the patent by another firm selling the same article on its merits under their own name. This might be difficult when the product has no other title than that bestowed upon it by the first producer, such as "Tabasco," and "Linoleum." *New Iberia, etc. Co. v. McIlhenny's Son*, 61 So. 131 (La.); *Linoleum Manufacturing Co. v. Nairn*, 38 L. T. R. 448. In such cases the court correctly found as a fact that the name had become descriptive of the article. But when, as in the principal case, the goods have a descriptive name other than that the patentee has bestowed, fair competition by another should be less difficult. In such cases, it is submitted, the courts should find as a fact that the name signifies the patentee, not the article. The court in the principal case, however, maintains that the Trade Mark Act of Feb. 20, 1905, c. 592, § 5, disposes of the case in view of the fact that this act has been held to mean that any mark, though not a valid trade mark at the time, may be registered if in exclusive use for ten years prior to 1905. *Thaddeus Davids Co. v. Davids*, 178 Fed. 801. But as it may well be doubted whether this section of the Trade Mark Act has an application to a situation of this kind, the principal case would seem to mark a change from the former harsh treatment accorded trade marks on patented articles.



TRADE MARKS AND TRADE NAMES — PROTECTION APART FROM STATUTE — BASIS AND EXTENT — TERRITORIAL LIMITATION. — The plaintiff manufactured and sold wafers under the name of "Boston Wafers." The defendant had been restrained from using that name within certain limits. The plaintiff now asks an injunction covering the whole of the United States, upon proving that he has established a secondary meaning in a few states outside the original limits. *Held*, that the defendant will be restrained in that territory only where the plaintiff has established such secondary meaning. *Briggs v. National Wafer Co.*, 102 N. E. 87 (Mass.).

The plaintiff can acquire in a trade name of this kind only the right to prevent another party's appropriating his good will. *Canal Co. v. Clark*, 13 Wall. (U. S.) 311; *Reddaway v. Banham*, [1896] A. C. 199. See 9 HARV. L. REV. 291; 13 HARV. L. REV. 152. It would seem to follow that his right to protection is merely coextensive with this good will, and the injunction should extend no further. Where two parties have each established a good will for the same trade name in different parts of the country, courts have refused to allow one to invade the territory of the other, apparently admitting the right of each to use the name in his own territory. *Cohen v. Nagle*, 190 Mass. 4, 76 N. E. 276; *Levy v. Waitt*, 61 Fed. 1008; *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 110 Pac. 23; see cases collected in 35 L. R. A. N. S. 251. Under such circumstances there would probably exist a third territory where anyone might use the trade name. This is the first case where a court has placed a sharply defined territorial limit upon a plaintiff's right of exclusion; but it is submitted that the result is perfectly equitable, and a logical extension of the previous decisions.

TROVER AND CONVERSION — DENIAL OF ACCESS TO PREMISES UPON WHICH A CHATTEL LIES. — The defendant, a tenant rightfully in possession of land, refused to allow the plaintiff, a former tenant, to enter and remove hay left there by him after the expiration of his tenancy, because such an entry would injure the growing crop. *Held*, that the defendant is not guilty of conversion. *Sears v. Sovie*, 143 N. Y. S. 317.

The decision is based on the reasonableness of the refusal, although it might well have rested on the narrower ground that the proposed entry would have been a trespass. Where an irrevocable license to enter and remove the chattel exists, denial of access is a conversion, because tantamount to wrongful detention. *Nichols v. Newsom*, 2 Murph. (N. C.) 302; *McKay v. Pearson*, 6 Pa. Super. Ct. 529. But where there is no such license, a denial of access, without more, seems clearly within the tenant's legal right. It is true that equity will not interfere to prevent a mere technical trespass by the owner of chattels under such circumstances. *Gates v. Johnston Lumber Co.*, 172 Mass. 495. And it has been said that an unreasonable denial of access, even to one having no right to enter, who wishes to remove his chattels, would be conversion. *Thorogood v. Robinson*, 6 Q. B. 769, at p. 772. This seems to have been the *ratio decidendi* of at least one decided case. *Erskine v. Savage*, 96 Me. 57, 51 Atl. 242. Although equity will not interfere to protect the tenant from such a threatened violation of his technical legal rights, it seems difficult to find a basis for its interference in favor of the owner of the chattels; and if no remedy exists at equity, it is even harder to justify the imposition of any duty at law.

TRUSTS — NATURE OF THE TRUST RELATION — DEPOSIT IN BANK FOR SPECIFIC PURPOSE — TO SECURE LETTER OF CREDIT. — The plaintiff had taken a letter of credit from the now insolvent bank, and had agreed in return that his salary should be deposited with them as it fell due. When the bank failed their books showed a large balance of deposits in excess of drafts. The plaintiff is seeking to recover the entire amount due him on the ground that the bank held his deposits as a trust fund. *Held*, that he must share with the

general creditors. *Taussig v. Carnegie Trust Co.*, 49 N. Y. L. J. 913 (N. Y. App. Div., April, 1913).

Money deposited in a bank is presumed to create the relation of debtor and creditor, and a trust fund cannot be made out unless there are special circumstances to show that the parties expressly intended thus to limit the deposit. *McGregor v. Battle*, 128 Ga. 577, 58 S. E. 28. The principal case seems clearly right, for nothing appears in the agreement to indicate that the bank was not at liberty to mingle the salary payments with its own funds as fast as they were deposited, and there can therefore be no specific trust *res*. *Kuchne v. Union Trust Co.*, 133 Mich. 602, 95 N. W. 715. On the general question of distinguishing between trust funds and general deposits, see 12 HARV. L. REV. 221; 16 HARV. L. REV. 228; 25 HARV. L. REV. 558.

## BOOK REVIEWS.

**DAS PROBLEM DES NATÜRLICHEN RECHTS.** By Erich Jung, Professor in the University of Strassburg. Leipzig: Duncker and Humblot. 1912. pp. iv, 334.

A few years ago, nothing seemed to be so dead as "natural law." It seemed to be agreed that attempts to work out jural ideals were quite futile, except as analysis, comparative law, and legal history might be made to yield criteria by which particular rules might be measured in order to make the law more systematic and logically consistent. In truth, in the nineteenth century "natural law" was an exotic. The watchwords of the time were certainty and security. The legal institutions of the time, to which jurists sought to assimilate all things, were property and contract. It was a period not of growth but of maturity, and such periods have little use for philosophy.

To-day a movement is in progress which is very like the transition from the stage of strict law to that of equity in the *jus gentium* and in the rise of the court of chancery. Indeed the analogy to the latter is especially noteworthy. The strict law took no account of the moral aspect of conduct. In its zeal for certainty and uniformity it became so wholly unmoral that a sixteenth-century serjeant at law could gravely inform us that it was contrary to the law of God that a specialty creditor who had been paid but who had not given a release under seal should be precluded from exacting payment a second time. In like manner, in its zeal for security of acquisitions and security of transactions, the law of the nineteenth century came almost to ignore the moral worth of the individual. An infusion of moral ideas from without the law proved the remedy in the former case. In the latter, a like infusion of social ideas from without is evidently to be the remedy. But, what is more significant for the present purpose, when jurists come to be affected by the movement, they have recourse once more to the phrase "natural law," which has done duty twice before in legal history under like circumstances. Accordingly we have a revival of natural law in France, and now Germans, who but the other day were speaking scornfully of *das selige Naturrecht* are devoting elaborate treatises to the problem of jural ideals. A constructive period is at hand, the analytical and historical methods, which suffice for a period of maturity and stability, fail to satisfy, and the old attempts to construct an ideal law suggest that we may at least work out the ideals of the time and place and thereby provide a better critique of rules and doctrines and a surer basis for their development whether by judicial experience or by legislation.

For the most part Professor Jung's book has to do with problems connected with the Continental codes. At first these problems would seem to have little direct or immediate interest for the American lawyer. Except to some extent



in applying our bills of rights, we are not called upon to devise theories of interpretation which will enable the law to grow although tied to authoritative texts. Our task is rather to work out means of developing our received tradition along new lines. But the immediate agency of growth in each case is to be judicial empiricism. This goes without saying in our law, and recent continental writing indicates clearly enough that it will be true substantially for the rest of the world.

In other periods of growth, the chief force has been the attempt of jurists to make law conform to certain ideals. If in the past the mistake has been made of trying to discover universal ideals, valid for all men, in all times, at all places, yet in practice these ideals have proved to be ideals of the epoch and of the locality. They have failed to maintain themselves for the very reason that made them valuable. Purporting to be absolute and universal, they have been relative and even provincial. Hence the easy victory of the historical school, in overthrowing the notion of an absolute natural law, has proved short lived. The attempt to make the law conform to ideals provided a healthy critique for which analysis and history have not been able to afford a substitute.

If judicial empiricism may be guided consciously by philosophical statement of the ends to be reached and a critical study of the judicial sense of right as a source of law, a science of judicial law making may be attained which is of much more practical importance in a period of legal growth than the science of legislative law making, to which we are coming to give so much attention. The reshaping of the traditional element of our law demands some such science, and we cannot be content much longer with theories of law making which neglect the principles and ideals which should govern in shaping the most significant, and most enduring portions of the legal system. Professor Jung, therefore, is dealing, from a continental standpoint, with problems with which we also must wrestle. The thoughtful student of American law, and above all the American teacher of law, in whose work, as Professor Williston has shown, ideals of law are especially important, cannot fail to read such a book with profit.

R. P.

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A DIGEST OF EQUITY. By J. Andrew Strahan and G. H. B. Kenrick. Third Edition, by J. Andrew Strahan, assisted by C. H. Castor. London: Butterworth & Co. 1913. pp. liv, 562, and 33 (index).

It is something of an undertaking to set forth in an octavo volume of less than six hundred pages the English law on the various subjects included under the head of Equity. Mr. Strahan and Mr. Kenrick, however, have produced such a treatise and one which cannot fail to give the student, for whose use it is primarily intended, a real conception of the system of Equity as administered in the English courts to-day. The statements of the leading principles, which are printed in large type, show a talent for isolating the fundamental. The illustrative cases, about thirteen hundred in number, are well selected and discussed with discrimination.

In dealing with the subject of Trusts, which occupies nearly a third of the book, the authors wisely refrain from attempting to define a trust, but an attentive reader will grasp its real nature and characteristics. It does not seem, however, that the classification of Trusts is altogether fortunate; while the reader will understand what is meant by Declared and Constructive Trusts, the scope of Presumed Trusts is not so evident. The statement (p. 203) that "owing to the decision that trusts in land do not arise by operation of law on the transfer of the land to a person who gives no value, if such a trust is intended it must be evidenced by writing," seems to be misleading as a statement of the English law, in view of the decision of *In re Duke of Marlborough*, [1894] 2 Ch. 133 and the cases there cited. The statement of the doctrine of Subroga-

tion (p. 356) seems hardly accurate. The proposition as to Assignment of After Acquired Property (p. 357) seems to be laid down somewhat too broadly.

The changes in this edition are not extensive. The book on the jurisdiction of Chancery has been recast and enlarged, and to that on Equitable Rights matter has been added relating to Married Women's and Infants' Property. The brevity of the time which has elapsed since the prior editions appeared shows the well-deserved popularity of the book.

A. W. S.

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**THE LAWYER IN LITERATURE.** By John Marshall Gest. Boston: Boston Book Co. 1913. pp. xiv, 249.

The scope of this book is indicated by its table of contents, which includes essays on the law and lawyers of Charles Dickens, Sir Walter Scott and Balzac, on the writings of Coke, the influence of Biblical texts on English law, and on the historical method of studying the law, as illustrated by the law of Master and Servant. Most of the chapters have been published previously in law magazines, but they are well worth gathering in a book.

Though the law has always been said to be a jealous mistress, yet a certain flavor of literature has clung to it, and there will be cause for regret if this ceases to be true as the profession becomes more utilitarian in its aims and the work of its members more narrowly specialized.

Dean Wigmore contributes an interesting preface to Judge Gest's book, in which he sets forth the practical advantages to a lawyer of an acquaintance with literature. Doubtless there are practical advantages. If there were none other than to enable him to view in a better perspective faults, real or imaginary, of the law and lawyers, it would be much.

When we read the exhortation of Dick the Butcher to Jack Cade, "The first thing we do, let's kill all the lawyers"; and discover the length of time that it took Lord Eldon to decide a suit in Chancery, and remember that, nevertheless, the law and lawyers have survived and improved, we are justified in hoping that they may survive a good while longer and make further improvement without a complete social upheaval to bring about these results.

But to those who care for it, literature is likely to be like beauty, its own excuse for being; and if this little book excites an interest in the books with which it deals, and with other books of great writers, it will serve a good purpose.

S. W.

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**REGULATION, VALUATION, AND DEPRECIATION OF PUBLIC UTILITIES.** By Samuel S. Wyer. Columbus, Ohio: Sears & Simpson Co. 1913. pp. 313.

There is a good deal that is valuable in this rather unusual book upon the general subject of public-service regulation, and the form of the presentation is well designed to give the reader access to its contents. It is plain that the arrangement of the book has received much thought, and it is worked out in the careful way engineers have. Each chapter is carefully analyzed by a diagram prefacing it, and each paragraph is backed up by a reference to its source in the authorities. The reference data and the selected bibliography increase the value of the book as a reference work. The book is apparently designed to put the engineering profession in touch with the way the legal profession views these problems. But it should be of equal value in putting at the disposal of lawyers the methods used by engineers in reporting upon public utilities. We are undertaking to regulate all the doings of these public services by legal principles now-a-days. And the lawyer must, therefore, have an understanding of the technique of the businesses with which he is dealing, such as he may get in this hand-book for engineers.

B. W.



A HISTORY OF DIVORCE. By S. B. Kitchin. Cape Town: J. C. Juta & Co. 1912. pp. xvi, 293.

This book is an essay on the history of divorce from the early Roman to the present times. It is not a complete history of the subject, for the author has not had the use of unusual library facilities. It covers in a brief, readable way the law during the Roman period, in the Eastern Church and Eastern Europe, in the canon law and Western Europe, from the Reformation to the French Revolution, in England, the United States, and the British Colonies. Only sixteen short pages are devoted to the United States, the most fruitful field for constructive work in divorce law. The book is as complete as anything now in existence on the whole subject, but is far from being exhaustive. The most interesting feature is the writer's treatment of the various intellectual and religious movements affecting divorce.

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NOTES ON THE SCIENCE OF GOVERNMENT AND THE RELATIONS OF THE STATES TO THE UNITED STATES. By Raleigh C. Minor. University of Virginia: Anderson Brothers. 1913. pp. x, 171.

EL FENOMENO DE LA GUERRA. By Jorge del Vecchio. Madrid: Hijos de Reus, Editores. 1912. pp. 171.

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## THE END OF LAW AS DEVELOPED IN LEGAL RULES AND DOCTRINES.

### I. SOCIAL JUSTICE AND LEGAL JUSTICE.<sup>1</sup>

IT is said that law is the body of rules and principles in accordance with which justice is administered by the authority of the state. In other words, the object of law is the administration of justice. At the outset, then, we are met by the question, what is justice? What is the end which we seek to attain through the legal system? This question may be taken up historically or philosophically. We may inquire what is the end of law as it has developed in legal rules and doctrines and as it has developed in juristic thought. On the other hand we may inquire what ought to be conceived as the end of law. We may ask, what do economics, politics and ethics point out as the purpose toward which the legal system is to be directed? Pursuing these inquiries, one

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NOTE. — The substance of this paper will appear in a forthcoming book to be entitled "Sociological Jurisprudence."

<sup>1</sup> See my paper, Social Justice and Legal Justice (address before the Allegheny County Bar Ass'n at Pittsburg, April 5, 1912), 75 Central Law Journal, 455. On the subject of the end of law reference may be made to Miller, *The Data of Jurisprudence*, chap. 6; Salmond, *Jurisprudence*, § 9; Pulszky, *Theory of Law and Civil Society* § 173; Bentham, *Theory of Legislation, Principles of the Civil Code*, pt. I, chaps. 1-7; Holland, *Jurisprudence*, chap. 6; Gareis, *Vom Begriff Gerechtigkeit*; Demogue, *Notions fondamentales du droit privé*, 119-135. See also Kant, *Metaphysische Anfangsgründe der Rechtslehre, Einleitung in die Rechtslehre*, 2 ed., § C, pp. xxxiii ff. (Hastie's transl. pp. 45-46); Spencer, *Justice*, chaps. 5, 6; Willoughby, *Social Justice*, chap. 2; Sidgwick, *The Methods of Ethics*, chap. 5; Paulsen, *Ethics* (Thilly's transl.), chap. 9; Dewey and Tufts, *Ethics*, chaps. 20-24.



quickly perceives a significant divergence between the idea of the end of law which had developed in actual rules and doctrines and obtained in juristic thought at the end of the nineteenth century, on the one hand, and the idea of justice which had come to obtain in the other social sciences. So marked was this divergence that the promoters of social legislation did not hesitate to contrast what they called legal justice with social justice.<sup>2</sup>

Many examples of the divergence between the nineteenth-century legal conception of justice and the conception which came to obtain in the other social sciences at the end of that century might be cited. But one will suffice for our purpose, namely, the course of decision of the courts from 1890 to 1900, and in some of our courts down to 1910, upon the subject of liberty of contract. Two of our state courts, in passing adversely upon labor legislation because it infringed upon a theoretical equality of contract, noted the frequency of such legislation in recent times, but said (one of them as late as 1902) that it was not necessary to consider the reasons therefor.<sup>3</sup> Another court asked what right the legislature had to "assume that one class has need of protection against another."<sup>4</sup> Another court said gravely that the remedy for the company-store evil was "in the hands of the employee," since he is not compelled to buy from the employer;<sup>5</sup> overlooking that there may be a compulsion in fact where there is none in law.<sup>6</sup> Another

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<sup>2</sup> Is Class Conflict in America Growing and is It Inevitable? *American Journal of Sociology*, XIII, 764. See also Ross, *Social Psychology*, 211-212. A number of instances are collected in my papers, *Do We Need a Philosophy of Law*, 5 *Columbia L. Rev.* 339; *Liberty of Contract*, 18 *Yale L. Journ.* 454.

<sup>3</sup> *Lowe v. Rees Printing Co.*, 41 *Neb.* 127, 135; *State v. Kreutzberg*, 114 *Wis.* 530, 537. It must be said, however, that at least one of these courts would not take such a position to-day. See *Borgnis v. Falk Co.*, 147 *Wis.* 327.

<sup>4</sup> *State v. Haun*, 61 *Kan.* 146, 162.

<sup>5</sup> *State v. Fire Creek Coal & Coke Co.*, 33 *W. Va.* 188, 190. While the court was laying down this academic proposition, those who had studied the actual situation were pointing out that the contrary was true in fact. "He is not free to make such a contract as might please him because, like every party to a contract, he must come to such conditions as can possibly be agreed upon. He is less free than the parties to most contracts, and, further, he cannot utilize his labor in many directions; he must contract for it within restricted lines." Wright, *Practical Sociology*, 5 ed., 226.

<sup>6</sup> "Probably the modification of this general principle [assumption of risk] by some judicial decisions and by statutes like [the Federal Safety Appliance Act] . . ., is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist." Holmes, J., in *Schlemmer v. Buffalo R. & P. R. Co.*, 205 *U. S.* 1.

said that "theoretically there is among our citizens no inferior class"<sup>7</sup> — and, of course, no facts could avail against that theory. Because it violated a theoretical abstract equality, legislation designed to give workers some measure of practical independence under the actual conditions of modern industry, was said by state courts at the end of the nineteenth century to put them under guardianship,<sup>8</sup> to create a class of statutory laborers,<sup>9</sup> and to stamp industrial laborers as imbeciles.<sup>10</sup> As late as 1908, even the Supreme Court of the United States dealt with the relation of employer and employee in railway transportation as if the parties were farmers haggling over the sale of a horse.<sup>11</sup> Only the other day, the highest court of New York told us that a workmen's compensation act "does nothing to conserve the health, safety or morals of the employees."<sup>12</sup> This artificial type of reasoning is fast disappearing from the books in this particular connection. Today it does not need to be refuted outside of a decreasing minority of our state courtrooms. The Supreme Court of the United States abandoned it definitely some years ago.<sup>13</sup> But the type of reasoning of which it is an example is not extinct. When that

<sup>7</sup> *Fraser v. People*, 141 Ill. 171, 186, holding adversely to a statute prohibiting company stores and requiring miners to be paid weekly.

<sup>8</sup> *Braceville Coal Co. v. People*, 147 Ill. 66, 74 (coal to be weighed for fixing wages); *State v. Haun*, 61 Kan. 146, 162 (wages to be paid in money).

<sup>9</sup> *People v. Beck*, 10 Misc. (N. Y.) 77 (dissenting opinion of White, J.). The statute fixed hours of labor on municipal contracts.

<sup>10</sup> *State v. Goodwill*, 33 W. Va. 179, 186 (statute against payment in store orders). Another court said such legislation was insulting to the manhood of laborers. *God-charles v. Wigeman*, 113 Pa. St. 431, 437 (wages in iron mills to be paid in money). In *Lochner v. New York*, 198 U. S. 45, 57, Peckham, J., said: "They are in no sense wards of the state." Compare also the language of Harlan, J., in *Adair v. United States*, 208 U. S. 161, 175: "The right of a person to sell his labor upon such terms as he deems proper, is in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the service of such employee. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land." See the comments upon this case in Mr. Olney's paper, 42 *American L. Rev.* 164.

<sup>11</sup> *Adair v. United States*, 208 U. S. 161, 175.

<sup>12</sup> *Ives v. South Buffalo R. Co.*, 201 N. Y. 271.

<sup>13</sup> *McLean v. Arkansas*, 211 U. S. 539; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 566-575.



type of reasoning is repeated in some of our state courts, sociologists and economists are justified in the angry retorts with which they meet it. It is not necessary to quote recent critiques of the decision upon the workmen's compensation act in New York. Speaking of prior cases, Ward said: "Much of the discussion about equal rights is utterly hollow. All the ado made over the system of contract is surcharged with fallacy."<sup>14</sup> Professor Ely said of the reasoning in the same cases: "For one who really understands the facts and forces involved, it is mere juggling with words and empty legal phrases."<sup>15</sup> "Deadening and monotonous toil too long continued," said Professor Seager, "is much more inimical to the spirit of independence than any amount of legislation."<sup>16</sup>

As will be shown presently, a change has been taking place, and at some points this change is going forward rapidly. But as yet there are only beginnings. On the whole we must admit the divergence between legal thought, as it had proceeded up to the present decade and as it now proceeds for the most part in America, upon the one hand, and economic and sociological thought upon the other hand. Hence we have not merely to ask, what is the legal idea of justice? It is of no less moment to know why this idea differs from the economic and sociological idea of justice. We have to ask, why did the legal idea come to be what it is and why does it so persistently remain such?

The actual legal doctrines of the place and time have always so completely influenced the legal ideal of that place and time that the development of the one must be understood in order to understand the other. Hence the several questions put must be approached historically. The first inquiry, then, should be, what is the end of law as it has developed in legal rules and doctrines?

## 2. ARCHAIC LAW.<sup>17</sup>

In the beginnings of law the idea is simply to keep the peace. In primitive law justice, in the sense of the end of the legal system,

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<sup>14</sup> *Applied Sociology*, 281.

<sup>15</sup> *Economic Theory and Labor Legislation*, 18.

<sup>16</sup> *Introduction to Economics*, 3 ed., 423.

<sup>17</sup> Holmes, *The Common Law*, Lect. I; Jenks, *Law and Politics in the Middle Ages*, chap. 4; Maine, *Ancient Law*, chap. 10; Clark, *Early Roman Law*, *The Regal Period*; Strachan-Davidson, *Problems of the Roman Criminal Law*, chap. 3; Westermarck,

was a device to keep the peace. Whatever served to avert private vengeance and prevent private war was an instrument of justice. The law existed as a body of rules by which controversies were adjusted peaceably. At first, therefore, it attempted nothing more affirmatively than to furnish the injured person a substitute for revenge. Where modern law thinks of compensation for an injury, archaic law thought of composition for the desire to be avenged. Where modern law seeks a rational mode of trial that will bring forth the exact truth, archaic law sought an acceptable mechanical mode of trial, which would yield a certain, unambiguous result, without opportunity for controversy and consequent disturbance of the peace.

Primitive society recognized three ways in which an injured person might obtain redress: (1) by self help, (2) by the help of the gods or of their ministers, and (3) by the help of the state or political organization. The first meant in antiquity redress by the help of oneself and of his kinsmen, so that reprisals, private war and the blood feud are ordinary institutions of primitive society for the redress of injuries.<sup>18</sup> But a condition in which self help and private war are normal processes of society is the very antithesis of the legal order. Accordingly in its beginnings law is a means toward the peaceable ordering of society. Along with religion and morality, it is a regulative agency by which men are restrained and the social interest in general security is protected.<sup>19</sup> And it retains this character of a regulative agency and of a means of which the end is a peaceable ordering, although other ends become manifest as it develops. To establish this peaceable ordering two tasks had to be undertaken, (1) to regulate self help and ultimately supersede it, (2) to prevent aggression. The former was quite as important as the latter. For while ag-

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Origin and Development of the Moral Ideas, I, 175-185, 477-491; Hobhouse, *Morals in Evolution*, I, 79-133; Post, *Ethnologische Jurisprudenz*, vol. II, bk. 4; Leist, *Graeco-Italische Rechtsgeschichte*, §§ 28-53; Amira, *Grundriss des germanischen Rechts*, chaps. 4 and 6.

<sup>18</sup> Dareste, *Le droit des représailles*, *Nouvelle études d'histoire du droit* (1902), 38; Leist, *Altarisches Jus Gentium*, § 68; Post, *Ethnologische Jurisprudenz*, §§ 58, 62; Fehr, *Hammurapi und das salisches Recht*, chap. 5; Brunner, *Deutsche Rechtsgeschichte*, II, § 22; Maurer, *Altnordische Rechtsgeschichte*, V, pt. I.

<sup>19</sup> "Religion, law, and morality cover the area of human action with rules and sanctions." Stubbs, *Lectures on the Study of Medieval and Modern History*, 336. Cf. Salmond, *First Principles of Jurisprudence*, 17-18.



gression upon individuals did affect the social interest in general security, no small part of this effect was due to the certainty that such aggression would lead to private war.<sup>20</sup> Hence the original problem of the law was to narrow the field of self help, to regulate self redress and finally to supersede it by peaceful modes of redress. One step in this direction was to protect self redress when used to obtain satisfaction for injury to a recognized interest. In such cases the law endeavored to prevent the wrongdoer or his kindred from interfering with self redress by the person wronged or his kindred.<sup>21</sup> Another step was to put limitations upon the prosecution of private war and of the blood feud.<sup>22</sup> In time the

<sup>20</sup> Hence, the Anglo-Saxon laws often do not denounce the original aggression but the denial of justice by the wrongdoer afterward. For example: "That is, then, that no man deny justice to another; if any one do so, let him make *bot* [*i. e.*, composition] as it before is written." Laws of King Edward, 4 (Thorpe's transl.). Cf. Laws of Ine, 8; Athelstan, 3.

<sup>21</sup> *E. g.*, "And if it should happen that any kin be so strong and so great, within land or without land, whether XII-hynde or twy-hynde, that they refuse us our right and stand up in defense of a thief, that we all of us ride thereto with the reeve within whose *manung* it may be." *Judicia Civitatis Lundoniae*, VIII, 2.

<sup>22</sup> The Anglo-Saxon Laws contain many provisions against proceeding by distress or other form of self-redress before demand of justice or without leave of the *gemot*. *E. g.*, Ine, 9: "If any one take revenge before he demand justice, let him give up what he has taken and pay, and make *bot* with thirty shillings." See also Cnut, 19. Compare the decree of the Diet of the German Empire at Nürnberg (1187): "We decree and direct . . . that he who intends to do damage to another or to injure him shall give notice to him at least three days before by a sure messenger." Also: "Whoever is going to contend about a freeman or a slave, shall not lead him away before trial." Twelve Tables of Gortyna, § 1 (Roby's transl., 6 L. Quart. Rev. 142). See also the limitations on distress in the Brehon Law, Maine, *Early History of Institutions*, Lect. II.

Elaborate regulations of the feud may be seen in Alfred's Laws, 42; Edmund's Laws, 7. See also the Decree of the Emperor Henry IV Concerning a Truce of God (1085), translated in Henderson, *Historical Documents of the Middle Ages*, 208. Compare: "If any one is killed violently, reprisals by seizing men (*τὰς ἀνδραπολείας*) to be a right of his nearest relatives until justice is done for the murder or the murderers are surrendered. But this right of reprisal to extend to three men and no more." Law of Draco, quoted by Demosthenes, *Against Aristocrates*, § 96. Also the limitation upon the feud in the Salic Law, tit. 57, and the regulations as to the persons who may prosecute the feud and who shall be liable thereto in the Laws of Howel the Good, Evans, *Welsh Medieval Law*, 187. See also Dareste, *Le prix du sang*, *Nouvelle études d'histoire du droit* (1902) 1-11.

The Germanic institution of the truce or peace which, under the form of the king's peace, plays so important a part in the history of the common law, is another example. Still another may be found in the provisions in archaic codes as to the extent and manner of retaliation. *E. g.*, Hammurabi, §§ 196-214; Twelve Tables, VIII, § 2; Manu, VIII, 279 ff.; Abdur Rahim, *Muhammadian Jurisprudence*, 358-359.

law was strong enough to eliminate private war entirely,<sup>23</sup> and it remained only to limit self help and self redress to those few cases where, from the very nature of the legal administration of justice, vital social or individual interests would be without protection unless the individual might act summarily and vigorously.<sup>24</sup>

Redress by the help of the gods or of their ministers, where the wrong was an impiety — an affront to the gods, thus endangering the community that harbored the offender<sup>25</sup> — furnished the law its first effective weapon through the development of what may fairly be called excommunication into outlawry.<sup>26</sup> Corresponding to the three regulative agencies above referred to, the Romans recognized three bodies of rules: *Fas*, that which accorded with the will of the gods, ascertained through religion and enforced in theory through supernatural sanctions and in practice through pontifical penalties;<sup>27</sup> *boni mores*, that which accorded with the settled custom of men, resting in tradition and sanctioned by social pressure,<sup>28</sup> and law, ascertained by agencies of the state and sanctioned by the force of the state. Of the three, law had behind it the weakest force in primitive society; but with the rise of the state it took over more and more the whole task of regulation and of

<sup>23</sup> The whole history of this matter, so far as the Teutonic laws are concerned, is well set forth in Jenks, *Law and Politics in the Middle Ages*, chap. 4.

<sup>24</sup> In Roman Law, see Dig. IV, 2, 13, IX, 2, 45, § 4, XLIII, 16, 1, § 27; Cod. VIII, 4, 7. See also Muirhead, *Historical Introduction to the Private Law of Rome*, 2 ed., 102. In the common law, see 3 Blackstone, *Commentaries*, 1-16. It should be noted that of the six cases for self-help discussed by Blackstone, the third and the sixth are now obsolete and the fifth is much restricted by statutes.

<sup>25</sup> See, for example, the plague sent upon the whole host for the impiety of Agamemnon, *Iliad*, bk. I. Cf. Jenks, *Law and Politics in the Middle Ages*, 57: "A new departure is full of dangers, not only to the man who takes it, but to those with whom he lives, for the gods are apt to be indiscriminate in their anger."

<sup>26</sup> Post, *Ethnologische Jurisprudenz*, II, § 68; Strachan-Davidson, *Problems of the Roman Criminal Law*, chap. 1; Muirhead, *Historical Introduction to the Private Law of Rome*, 2 ed., 52-54; Wilda, *Strafrecht der Germanen*, 278-280.

<sup>27</sup> Jhering, *Geist des römischen Rechts*, 3 ed., I, §§ 18, 18 a; Danz, *Der sakrale Schutz im römischen Rechtsverkehr*, 47 ff. Compare the penalties by way of penance in Hindu Law, *Manu*, XI, 49 ff. Also similar "sanctions" in the Brehon law, Maine, *Early History of Institutions*, Lect. II.

<sup>28</sup> Voigt, *XII Tafeln*, I, § 15. But this pressure exerted by the *gens* upon its members and the *collegium* upon its fellows was no mean regulative agency. The power of the king as censor of morals, which was exercised by the *censor* under the Republic, was developed by the *praetor* so as to make of *infamia* a legal institution. See Greenidge, *Infamia in Roman Law*, chaps. 3, 4.



preserving the peace. Upon the negative side, law achieved its task by doing away with private war, and greatly limiting self redress, by devising purely mechanical modes of trial,<sup>29</sup> and by endeavoring to satisfy the desire for vengeance of the individual who might not now help himself.<sup>30</sup> That endeavor was the first step toward a wider conception of the end of legal systems, the first step toward recognition of an end beyond mere keeping of the peace, toward which the peaceable ordering of men is but a means and the achievement whereof involves the securing of peace and order.

There are, accordingly, five noteworthy characteristics of archaic law.

(1) The measure of what the person wronged may exact is not the extent of the injury done but the extent of the desire for vengeance awakened. As was said at the outset, the idea is not compensation but composition.<sup>31</sup> This still survives to some extent in retributive theories of punishment.

<sup>29</sup> "In these trials there are various conceptions: the notion of a magical test . . . that of a call for the direct intervention of a divine justice . . . ; that of a convenient form or formula, sometimes having a real and close relation to the probable truth of fact, and sometimes little or no relation to it, like a child's rigmarole in a game — good at all events for reaching a practical result; that of regulating the natural resort of mankind to a fight; that of simply abiding the appeal to chance. . . . But what we do not yet find, or find only in its faint germs, is anything such as we know by the name of a trial, any determination by a court which weighs this testimony or other evidence in the scale of reason and decides a litigated question as it is decided now. That thing, so obvious and necessary, as we are apt to think it, was not worked out for centuries." Thayer, *Preliminary Treatise on Evidence*, 9-10.

<sup>30</sup> This is especially marked in the rules of archaic law as to injuries by slaves, animals, and inanimate things, *e. g.*, the Roman law as to noxal surrender, Gaius, IV, §§ 75-78. *Cf.* law of Draco, quoted by Plutarch, *Life of Solon*: "He enacted a law for the reparation of damage received from beasts. A dog that had bit a man was to be delivered up bound to a log four cubits long."

<sup>31</sup> See, for example, *Laws of Ethelbert*, 59, 60: "If the bruise be black in a part not covered by the clothes, let *bot* be made with thirty scaetts. If it be covered by the clothes, let *bot* be made for each with twenty scaetts." See also *Salic Law*, Title XIV, §§ 1-3; the Roman law as to *furtum manifestum* and *furtum nec-manifestum*, Gaius, III, §§ 183-192; *Laws of Howel the Good*, Evans, *Welsh Medieval Law*, 190-191, "A person's fore tooth is twenty four pence in value with three augmentations; and when a fore tooth is paid for, the worth of a conspicuous scar is to be paid with it. . . . There are three conspicuous scars upon a person: a scar on a person's face, valued at six score pence; a scar on the back of the right hand, valued at sixty pence; a scar on the back of the right foot, valued at thirty pence." According to the last, the permanent loss of two joints of the thumb (seventy-six pence halfpenny) did not call for so much as a scar upon the face.

(2) The rules of law are in the highest degree formal. This characteristic must be considered in connection with the next period of legal development.

(3) Modes of trial are not rational but mechanical, since the end is to reach a peaceable solution, not to determine the truth exactly in order to apply a remedy with precision. In this respect, arbitration in international law often affords a suggestive parallel.<sup>32</sup>

(4) The scope of the law is very limited.<sup>33</sup> There are no principles or general ideas. The law is made up of regulations as to self help, provisions for the special cases where one may have the active assistance of the king or magistrate,<sup>34</sup> a tariff of compositions<sup>35</sup> which the injured person or kindred must accept for the wrongs specified, payment whereof, also, may be compelled; and another tariff of penalties which the state (or the king) may exact to buy off its vengeance for the affront to its dignity involved in certain wrongs.<sup>36</sup>

(5) The legal unit is not so much the individual as a group of kindred.<sup>37</sup>

Many of these characteristics of the beginnings of law persist into the period of a true legal system. For a long time the develop-

<sup>32</sup> Westlake, *International Law*, I, 343.

<sup>33</sup> *E. g.*, "Further he [Hippodamus of Miletus, fifth century B. C.] held that there were but three kinds of laws, as the possible subjects of judicial procedure were but three, namely, assault, trespass and homicide." Aristotle, *Politics*, II, 8.

<sup>34</sup> These rules turn into a law of procedure. Even at a relatively late period of legal development the law is stated in the form of a system of actions and rules as to the cases in which they will lie. The register of writs in the common law and the praetor's edict in Roman law illustrate this.

<sup>35</sup> These tariffs of compositions are the staple of ancient codes: Hammurabi, §§ 198, 201, 203-204, 207-209, 211-214, 216-225; Twelve Tables of Gortyna, §§ 2-3; XII Tables, VIII, 2; Salic Law, tits. 2, 3, 11, 13, 14, 15, 17, 19, 30, 34, 41, 55; Ethelbert, §§ 16-72; Laws of Howel the Good, Evans, *Welsh Medieval Law*, 190-191.

<sup>36</sup> Thus, the provisions for *wite* in the Anglo-Saxon laws. Reminiscences of this may be seen in the conclusion of indictments, "against the peace and dignity" of the sovereign, and in the "fine," or in our old books, "ransom," literally a making peace with the sovereign for a misdemeanor by paying a sum of money.

<sup>37</sup> See the Athenian law as to reprisals, *supra*, note 22; Salic Law, tit. 57; Alfred, § 27; Edmund, I, 4. "If breach of the peace be committed in a fortified town, let the inhabitants of the town themselves go and get the murderers, living or dead, or their nearest kinsmen, head for head." Ethelred, II, 6. "And if any one charge one in holy orders with the feud and say that he was a perpetrator or adviser of homicide, let him clear himself with his kinsmen who must bear the feud with him or make *bot* for it." Ethelred, IX, 23.



ment of legal justice consists in getting away from them, as the conception of the end of law shifts from that of a mere keeping of the peace, of which these characteristics are for the most part corollaries, under the conditions of primitive society, to the broader ones, first of preserving the social status quo, and later of permitting the widest possible individual self assertion. The contribution of this period of legal development to the idea of justice is the conception of a peaceable ordering of society through the peaceable adjustment of controversies.

### 3. THE STRICT LAW.<sup>38</sup>

In a second stage of legal development, represented by the *ius civile* in Roman law and by the common law, or the law, as opposed to equity and to statutory modifications, in our own system, law has definitely prevailed as the regulative agency of society and the state has prevailed as the organ of social control. Moreover self help and self redress have been definitely superseded for all but exceptional causes. Normally, men appeal only to the state to redress wrongs. Hence the body of rules determining the cases in which men may appeal to the state for help comes to define indirectly the substance of rights and thus indirectly to point out and limit the interests recognized and secured. In this stage two causes operate to produce a system of strict law, namely, fear of arbitrary exercise of the power of state assistance to individual victims of wrong, and survival of ideas from the earlier period, that is, ideas proper to the beginnings of law. The chief end which the legal system seeks is certainty. Hence the cases in which the state will interfere, the mode in which it will interfere and the manner in which its interference may be invoked are defined in an utterly hard and fast way. The rules of law are wholly inelastic and inflexible.

Five characteristics of this stage of legal development may be noted: (1) Formalism, the law refuses to look beyond and behind the form; (2) rigidity and immutability; (3) extreme individualism; (4) entire indifference to the moral aspects of conduct or of transactions which satisfy the letter of the law, so that, to use Ames's phrase, the law is not immoral but unmoral; (5) restriction of rights to *legal* persons so that all human beings are not legal persons,

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<sup>38</sup> Jhering, *Geist des römischen Rechts*, II, §§ 45-47 d.

and arbitrary restriction of legal capacity. These characteristics of the strict law affect the whole course of development of legal justice.

Formalism is also a characteristic of the beginnings of law. It belongs to the *Vorgeschichte* of law as well as to the history of law as a system, and, indeed, persists into and beyond the period of strict law from the first stage.

Procedure is the first department of law to be developed. Hence it acquires a formal character in the period of strict law<sup>39</sup> which, in American law, it has not yet thrown off. To many this formal character of procedure has seemed essential. Thus in Greek law if a plaintiff sued for twenty minae and could prove only eighteen due, the issue being whether twenty were due, a verdict for the defendant was required.<sup>40</sup> Hippodamus of Miletus, a writer on politics of the fifth century B. C., objected to this rule, proposing that a third course, namely, to find for the plaintiff as to a part of his claim, should be opened to the triers. In commenting upon this proposal, Aristotle pronounces it impossible in courts of law because it converts the trier into an arbitrator. To the point made by Hippodamus that the trier was compelled by the rule to perjure himself, Aristotle answers:

“And further no one compels a juror to perjure himself if he returns a verdict of simple acquittal or condemnation<sup>41</sup> where the accusation is

<sup>39</sup> The classical example is in Gaius, IV, § 11: “Hence when one who sued for vines cut down named vines in his action, response was made that he lost his suit because he should have named trees, since the law of the Twelve Tables upon which the action for vines cut down lay, spoke generally of trees cut down.” The doctrine of theory of the pleading, which is just disappearing from American law, is strictly comparable. Under that doctrine, a modern version of the common-law strict forms of actions, the tribunal tries, not the plaintiff’s case, but his theory of it, so that reversal of a judgment may be necessary in order that the same case be tried over on the same evidence and to attain the same result, but on a formal statement of another theory. A striking application of this doctrine may be seen in *Allen v. Tuscarora V. R. Co.*, 229 Pa. St. 97.

<sup>40</sup> This is a common notion of archaic law. Compare the doctrine of *plus petitio* in Roman law, Gaius, IV, §§ 53-60, and the common-law rule in the action of debt. “In an action of debt the plaintiff must prove the whole debt he claims or recover nothing at law.” Blackstone, Commentaries, III, 155.

<sup>41</sup> “Acquit” and “condemn” are used in the same sense as in Roman procedure. Just as our procedure, influenced by the action of trespass, speaks of “damages” even where the liquidated sum due on an instrument is recovered, Greek and Roman procedure, influenced by the action to enforce a penalty for a delict, spoke of condemnation or acquittal of the defendant.



duly preferred in simple terms. For a juror who votes acquittal decides not that the defendant owes nothing but that he does not owe the twenty minae claimed, and the only person guilty of perjury is a juror who returns a verdict for the plaintiff when he does not believe that the defendant owes the twenty minae." <sup>42</sup>

In other words, Aristotle could see no mean between a strict rule that restricted the finding to a bare yes or no upon the letter of the claim and a turning of the cause over to arbitration, that is, to justice without law. Yet the strict law itself outgrew the rule which Aristotle thought essential,<sup>43</sup> and later apologists for ultra-formal procedure conceived instead that a bare passing upon the theory of his case presented by the plaintiff was essential to the legal administration of justice.<sup>44</sup> In reality both requirements grew out of the necessities of the purely mechanical modes of trial which obtain in the beginnings of law and have no place in a modern system.<sup>45</sup>

<sup>42</sup> Politics, II, 8 (Welldon's transl.).

<sup>43</sup> As to *plus petitio*, see Institutes, IV, 6, § 33. As to debt at common law, see *McQuillin v. Cox*, 1 H. Bl. 249 (1789).

<sup>44</sup> "It is vital to a constitutional judiciary." Hughes, *Grounds and Rudiments of Law*, II, 521. See also note in 8 Mich. L. Rev. 315. In the same way many contend that to take verdicts upon points of law reserved, with power to render judgment upon the verdict or upon the point reserved, if conclusive, as the court shall finally determine the law upon the point, "strikes a blow at trial by jury," since there may be a judgment without the empty form of a general verdict. What is, in this connection, a purely historical form is regarded as in some way a necessary safeguard, notwithstanding the obvious delay and expense involved in the retrials which it entails. See remarks of Mr. Gregory, Rep. Am. Bar Ass'n, XXXIV, 74; also the debate on the same proposition in 1908, Rep. Am. Bar Ass'n, XXXIII, 33-49, and in 1910, Id. XXXV, 56-66, and in the New York State Bar Ass'n in 1912, Rep. N. Y. State Bar Ass'n, XXXV, 376-390.

<sup>45</sup> Rules of the Supreme Court (England), order 2, rule 1, order 18 a; Consolidated Rules of the Supreme Court for Ontario, rules 138, 245. See also Wheeler, *Review of the New Jersey Practice Act*, 75 Cent. L. Journ. 144; Whittier, *Judge Gilbert and Illinois Pleading Reform*, 4 Ill. L. Rev. 178; Pound, *Some Principles of Procedural Reform*, 4 Ill. L. Rev. 388, 491; Comments of Professor Mendelssohn-Bartholdy in *Rheinische Zeitschrift für Zivil und Prozessrecht*, IV, 134. "There was just one genuine archaic element that persisted in the decadent forms of common-law pleading: the imperious desire for an authoritative decision of some kind rather than the best or most complete solution. Down to the latest period of unreformed pleading this was declared to be a fundamental principle, and we have no doubt that, being repeated by so many sages of the law, the declaration was made with perfect sincerity. Those learned persons might have known, if they had ever considered the matter with their eyes open, that their ideal was incompatible with any practical handling of modern disputes arising out of modern affairs." Pollock, *Genius of the Common Law*, 36.

Interpretation of legal precepts, of instruments and of transactions, is likewise formal in this period of strict law. Danz says of the *ius civile*:

"The oldest law of the Romans recognized no will other than the expressed will, the *dictum*. What is not spoken is not willed, and *vice versa*, that only is willed that is expressed. Therefore the word operates in legal transactions entirely independent of the thought which it should express. It is not that the *verba* are efficacious so far as they include the *voluntas*, but, for the law, their literal content is the *voluntas* itself. The rule is not, 'what thou hast willed and expressed shall be *ius*,' but only 'what thou hast expressed.' It is the very nature of the *strictum ius* that the will as such is without meaning."<sup>46</sup>

This is no less true of the beginnings of our own law.<sup>47</sup> No doubt, as Ames has said, it is in large part the unmoral primitive attitude of literalness applied to interpretation.<sup>48</sup> But formal literalness in interpretation is closely connected with the severe formalism of the strict law in every connection, and has its roots also in the same necessity of an impersonal, mechanical, speedy decision in a way not admitting of dispute which is behind most of the rigid forms of archaic procedure. Finally, it grows in part out of the sacred character of forms and of texts, deviation from the letter whereof, therefore, is manifestly impious and dangerous. Something of the latter feeling, in a period of absolute political theory, when a sort of sanctity is attributed to legislation, as an emanation from the sovereign people, leads many who assume that they are advocates of progress to denounce courts for endeavoring to give reasonable interpretations to statutes, assuming that any departure from the sacred literal text is usurpation.<sup>49</sup>

Substantive law likewise, in the period of strict law, is highly formal. "Estates in land," Coke tells us, "begin in ceremony and end in ceremony."<sup>50</sup> Conveyances, to be given effect, must con-

<sup>46</sup> Lehrbuch der Geschichte des römischen Rechts, I, § 142. Cf. "At the beginning of the history of law one might write this motto: 'In principio erat verbum.'" Jhering, Geist des römischen Rechts, III, § 49.

<sup>47</sup> See Ames, Law and Morals, 22 HARV. L. REV. 97, 100-101; Gray, Restraints on the Alienation of Property, 2 ed., § 74 b.

<sup>48</sup> Law and Morals, 22 HARV. L. REV. 97.

<sup>49</sup> E. g., Smith, Spirit of American Government, 112; McCarthy, The Wisconsin Idea, 268-269; Roe, Our Judicial Oligarchy, chap. 4.

<sup>50</sup> Co. Lit. 214 b.



form to arbitrary formal requirements.<sup>51</sup> The important contract is the formal contract, the *nexum* or *sponsio* or *stipulatio* in Roman law, the specialty in Anglo-American law, in which the form is more than evidence, it is the very contract.<sup>52</sup> Consequently in Roman law, until the fusion completed by Justinian's legislation, we find always two sets of institutions and of rules. There are civil acquisition and natural acquisition, civil incapacities and natural incapacities, civil servitudes and praetorian servitudes, civil obligations and natural obligations. In the same way in the Anglo-American legal system, there are two sets of institutions, legal and equitable, and two sets of rules, legal and equitable, in every part of the private law. We say of these that equity looks to the substance and not the form, and the implication that the law, used in the sense of the older element, which grew up in the courts of common law, looks to the form is entirely in accord with the truth. In each case, the civil or the common-law rule or institution, which is formal, represents the stage of the strict law, while the natural or praetorian or equitable rule or institution, which is substantial, represents the later stage of equity or natural law.

What are the reasons for this formalism of the period of strict law?

For one thing, forms prevented dispute. The form was fixed. It was known or should be known by all. Men's ideas might differ as to whether there was something novel, called a substantial right, contained in or behind the form, and if so, as to what it was. But the form allowed no scope for such disputes, and in the beginnings of a legal system, as well as in the pre-legal period, a chief end is to avoid dispute. In any age or in any place where men are inclined on slight provocation to take the righting of wrongs into their own hands, the law that hesitates is lost.<sup>53</sup>

<sup>51</sup> Co. Lit. 214 b; Gaius, I, § 119, II, § 26.

<sup>52</sup> Ames, Specialty Contracts and Equitable Defences, 9 HARV. L. REV. 49.

<sup>53</sup> *Anle*, note 29. Hanifa (the oracle of Mohammedan law) gives as a reason for holding certain sales void that they involve an uncertainty which "would occasion contention between the parties." Hamilton's *Hedaya* (Grady's ed.), 244. There is a certain value in this in modern law. "The advantage of formalism is that the form is for a legal act what the stamp is for coin. It fixes its value and effect in an authoritative and easily recognizable manner. It is often difficult to determine whether what is said amounts only to a willingness to treat about a matter or is an absolute contract, and the adoption of a form removes this difficulty." Brantly, *Contracts*, 36.

Secondly, the strict law arose and took form when there were few records and records were possible only in very exceptional cases. Most things had to be preserved in the memory of witnesses or of magistrates.<sup>54</sup> Ceremonial was a stimulus to memory. Men could remember that a ceremony had taken place before them, especially one which everyone knew was the only way to produce legal results. They might or might not remember that an informal transaction had taken place in their presence; they might or might not remember its details. The details of formal transactions follow fixed lines. If one knows the kind of ceremony, the details fill themselves in with certainty. The details of informal transactions, on the other hand, vary infinitely and there is no means of knowing what they were save by remembering each detail. After records came into use, the ideas and tendencies belonging to a period of no records had become established, and formalism had a long tradition behind it.<sup>55</sup>

Third, and most important, forms were a safeguard against arbitrary action of the magistrate at a time when there was no elaborate body of substantive rules and principles to furnish standards of decision. Hence the great tenacity with which the common law has held to forms is connected with the Germanic and the Anglo-American jealousy of arbitrary magisterial action. In later periods of formal over-refinement, such as the eighteenth century, forms may sometimes come into the law for their own sake.<sup>56</sup> But the forms of the period of strict law subserved a purely practical purpose. Jhering says of them:

"Form is the sworn enemy of caprice, the twin sister of liberty. . . . Fixed forms are the school of discipline and order, and thereby

<sup>54</sup> "It was long before the theory was forgotten that the rolls of the courts were mere aids for the memories of the justices." Pollock and Maitland, *History of English Law*, 1 ed., II, 667. "We are not at all sure that the justices of assize of the first half of cent. xiii usually kept rolls." *Ibid.*, note 3. See Digby, *History of the Law of Real Property*, 5 ed., 147. So in the Roman law, until the reform of procedure in the later empire, even judgments were pronounced orally in the presence of the parties. Bethmann-Hollweg, *Civilprozess des gemeinen Rechts*, II, 624.

<sup>55</sup> "They [*i. e.*, forms] were often retained, more or less modified, simply because they had been always associated with some particular transaction." Muirhead, *Historical Introduction to the Private Law of Rome*, 2 ed., 144.

<sup>56</sup> As to the formal, dilatory, artificial procedure of the eighteenth century, see my paper, *Some Principles of Procedural Reform*, 4 *Ill. L. Rev.* 388, 491.



of liberty itself. They are a bulwark against external attacks, since they will only break, not bend, and where a people has truly understood the service of freedom, it has also instinctively discovered the value of form and has felt intuitively that in its forms it did not possess and hold to something purely external, but to the palladium of its liberty."<sup>57</sup>

Indeed the main argument of those who resist procedural reform today is that elimination of formal procedure will take away the safeguards against arbitrary judicial action.<sup>58</sup> But relatively few forms in modern law have been devised consciously for such an end. In modern law forms are of two kinds. By far the greater number are simply survivals. Some have survived from the period of formal law. In other cases substantial rules, devised for purposes now forgotten, survive their occasion in the shape of formal requirements. The second class of forms has been devised in modern times to serve substantial modern ends. For example, seal and consideration<sup>59</sup> in contracts are survivals. Each centuries ago ceased to serve the purpose for which it was devised and became a formal requirement only. On the other hand the statute of frauds imposes a modern form for modern reasons, namely, to protect the social interest in security of transactions and security of acquisitions. Forms must still play an important part where the law is seeking to protect those interests. But it must be remembered that the period of strict law is a period of legal remedies. While the logical sequence is interest, right, remedy, the historical sequence is the reverse, remedy, right, interest. When remedies were known, but not rights, the only limits of the remedy were formal. The rules which make up the traditional element of a legal system often grew up with reference to quite different ends

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<sup>57</sup> Geist des römischen Rechts, II, § 45 (5 ed., 471-472). See Heusler, Institutionen des deutschen Privatrechts, § 12; Pollock and Maitland, History of English Law, 1 ed., II, 561. Also Bleckley, C. J., in *Cochran v. State*, 62 Ga. 731, 733.

<sup>58</sup> See note 44, *supra*. Cf. Powell, Technicalities, So called, West Pub. Co.'s Docket, Jan., 1909, 6. Judge Powell argues that technicalities are "the characteristic which distinguished courts from mobs."

<sup>59</sup> Pollock, Contracts, 7 ed., 8; Holmes, J., in *Krell v. Codman*, 154 Mass. 454. The reason in the case of consideration is purely historical. The requirement arose from procedural difficulties which were forgotten for centuries till historians dug them up. Ames, History of Assumpsit, 2 HARV. L. REV. 1, 53, 377; History of Parol Contracts Prior to Assumpsit, 8 HARV. L. REV. 852. If today we can find a philosophical basis, consideration, as it has grown up historically, only conforms thereto in part.

from those we now seek and before the ends we now seek had been recognized. This is true especially of formal procedural rules. Today, when interests and rights are defined and remedies exist only for securing them within the defined limits, there are better means of controlling judicial action than hard and fast formal procedure.<sup>60</sup>

The same considerations are behind the rigidity and immutability that characterize the strict law. Conscious change appears to be at war with the very idea of law, since there are no fixed rules or settled principles to dictate its course. If the law is legislative in form, as in the case of the Twelve Tables, interpretation is the most that is permitted; for the idea of formally superseding law by new law if not inconceivable in such a period, would be startling, as implying that law was something arbitrary that could be adopted or rejected at will. In part this is no doubt a survival of the idea of sacred law, which is proper to the preceding period. But chiefly it is connected with the formal character of the strict law, since, as Jhering puts it, forms will break but not bend. Hence even a customary law or *usus fori* in this stage is fixed and unyielding.

Individualism and the unmoral attitude of the strict law are closely connected, although the latter is also connected with the formal character of the law, regarding nothing but conformity or want of conformity to the exact letter. Examples of individualism are the insistence upon full and exact performance at all events of a duty undertaken in legal form, without allowance for accident and without mercy for the defaulter,<sup>61</sup> the harsh standard of duress, regarding only imminent danger of life or limb,<sup>62</sup> the objective standard of fraud and of duress,<sup>63</sup> and the strict common-law doctrines as to contributory negligence and assumption of

<sup>60</sup> See my paper, *Some Principles of Procedural Reform*, 4 Ill. L. Rev. 388, 491.

<sup>61</sup> For example, the provisions of the Twelve Tables as to *nexi* and judgment debtors, Bruns, *Fontes Iuris Romani Antiqui*, 6 ed., I, 20-21; the rule of the common law that recognized and enforced a penalty or forfeiture incurred through the rising of a river which it was necessary for the debtor to pass in order to comply with the condition of an undertaking or a mortgage, or through some like mischance, Spence, *History of the Equitable Jurisdiction of the Court of Chancery*, I, 629.

<sup>62</sup> Code, II, 4, 13; Blackstone, *Commentaries*, I, 129-131.

<sup>63</sup> "Moreover, it is not the fear of a foolish man but that which might befall even a very firm man which we shall speak of as belonging to this edict." Digest, IV, 2, 6. Compare Blackstone, *Commentaries*, I, 131.



risk. Examples of the unmoral attitude of the strict law are its ignoring of trusts,<sup>64</sup> its refusal to consider mistake, fraud or duress where one of its formal legal transactions is in question,<sup>65</sup> its refusal to recognize payment where a formal contract is not formally released,<sup>66</sup> its refusal to permit set offs,<sup>67</sup> its refusal to give legal effect to a mere promise, however deliberate, without more,<sup>68</sup> its doctrine of the independence of the two sides of a bilateral contract.<sup>69</sup> The idea in each case is that a man of full age must take care of himself. There is no legal paternalism or maternalism to save him from himself. If he has made a foolish bargain he must perform his side like a man, for he has but himself to blame; if he has acted, he has done so at his own risk with a duty of keeping his eyes open, and he must abide the appointed consequences. In short he must "be a good sport" and bear his losses smiling. Hence the stock argument of the strict law for the many harsh rules it enforces is that the situation was produced by the party's own folly and he must abide it.<sup>70</sup> But the whole point of view is that of primitive society,<sup>71</sup> and, despite the eulogies which have been pronounced upon these features of the strict law as molders of strong and self-reliant character,<sup>72</sup> it may be asserted confidently that they

<sup>64</sup> Institutes, II, 23, § 1; Doctor and Student, Dial. II, chap. 7.

<sup>65</sup> Gaius, IV, §§ 116, 117; Ames, Specialty Contracts and Equitable Defenses, 9 HARV. L. REV. 49.

<sup>66</sup> Gaius, III, § 168; Doctor and Student, Dial. II, chap. 6; Replication of a Serjaunte at the Lawes of England to Certain Pointes Alleged by a Student of the said Lawes, Hargrave, Law Tracts, 323, 324-325; Finch, Law, bk. I, chap. 3, § 7.

<sup>67</sup> Institutes, IV, 6, § 30; Spence, History of the Equitable Jurisdiction of the Court of Chancery, I, 651.

<sup>68</sup> Paulus, Sententiae, II, 14, § 1; Doctor and Student, Dial. II, chap. 24.

<sup>69</sup> Langdell, Summary of the Law of Contracts, §§ 140-143. Cf. the original doctrine of the common law as to conditions in bilateral contracts: "What is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he make a bargain and rely on another's covenant or promise to have what he would have done to him, it is his own fault." Holt, C. J., in *Thorp v. Thorp* (1701), 12 Mod. 455.

<sup>70</sup> Britton, bk. II, chap. 2, § 6 (86); *Rich v. Aldred*, 6 Mod. 216; Reeves, History of English Law, III, 453-454; Story, Equity Jurisprudence, II, § 803.

<sup>71</sup> Tacitus tells us the Germans played dice as a serious business even staking their liberty, and that if one lost in such a case, he voluntarily went into slavery and "patiently allowed himself to be bound and sold." Germania, 24.

<sup>72</sup> Dillon, Laws and Jurisprudence of England and America, 157; Cooley, Constitutional Limitations, 7 ed., 50; Bryce, The Influence of National Character and Historical Environment on the Development of the Common Law, Rep. Am. Bar Ass'n, XXXI, 444; Mercer, The Relationship of Law and National Spirit, Rep. Am. Bar

were not devised to any such end, that at best they subserve such an end but little, and that they defeat social interests of general security and general morals and individual interests of personality and substance which the law ought to protect.

Comparing the period of strict law with the prior stage of legal development, the beginnings of law, it may be said that whereas the end of the latter is public peace the former has advanced to the more general notion of security, that whereas the means employed by the latter is composition, the former has advanced to the conception of legal remedies, and that whereas the contribution of the latter to the idea of justice is the conception of a peaceable ordering, the contributions of the period of strict law are the ideas of certainty and uniformity and of rule and form as means thereto.

#### 4. EQUITY: NATURAL LAW.<sup>73</sup>

A stage of liberalization, which may be called the stage of equity or natural law, succeeds the strict law. This stage is represented in Roman law by the periods of the *ius gentium* and *ius naturale*, in English law by the rise of the Court of Chancery and development of equity, in the law of Continental Europe by the period of the law-of-nature school, that is, the seventeenth and eighteenth centuries. The watchword of the stage of strict law was certainty. The watchword of this stage is morality or some phrase of ethical import, such as good conscience, *aequum et bonum*, or natural law. The former insists on uniformity, the latter on morality; the former on form, the latter on justice in the ethical sense; the former on remedies, the latter on duties, the former on rule, the latter on reason. The capital ideas of the stage of equity or natural law are the identification of law with morals,<sup>74</sup> the conception of

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Ass'n, II, 143; Calkins, The Sufficiency of the Common Law, Proc. Neb. State Bar Ass'n, II, 59.

<sup>73</sup> Goadby, Introduction to the Study of Law, 107-115; Holland, Jurisprudence, 9 ed., 36-37; Korkunov, General Theory of Law (Hastings' transl.), § 17; Markby, Elements of Law, §§ 116-124; Miller, Data of Jurisprudence, 381-387, 391-407; Pulszky, Theory of Law and Civil Society, § 220; Salmond, Jurisprudence, § 13; Maine, Ancient Law, chaps. 2 and 3; Maitland, Equity, Lects. 1 and 2; Voigt, Das jus naturale, aequum et bonum und jus gentium der Römer, I (Die Lehre vom jus naturale, aequum et bonum und jus gentium der Römer); Buckland, Equity in Roman Law; Siegel, Deutsche Rechtsgeschichte, § 53.

<sup>74</sup> In what is perhaps the classical instance in the history of English equity, counsel



duty<sup>76</sup> and attempt to make moral duties into legal duties, and reliance upon reason rather than upon arbitrary rule to keep down caprice and eliminate the personal element in the administration of justice.

Four ideas of the first magnitude come into the law in this period. The first is that legal personality should extend to all human beings, that the legal unit should be the moral unit, that is, the human being, not a group, as in the beginnings of law and not an

argued to the Chancellor "that there is the law of the land for many things, and many things are tried in Chancery which are not remediable in the common law, and some things are only a matter of conscience between a man and his confessor." The Chancellor answers: "I know that every law is or ought to be according to the law of God. And the law of God is that an executor who is badly disposed shall not waste all the goods, etc.; and I know well that if he does so and does not make amends, if he has the power, unless he repents he shall be damned in hell." Y. B. 4 Hen. VII, 5. In the same spirit, the classical Roman jurists tell us that law is "the art of what is right and equitable" and that it is "that which is always equitable and right." Ulpian (quoting Celsus), Dig. I, 1, § 1; Paul, Dig. I, 1, 11. In the same spirit Continental jurists of the law-of-nature school "deviated from the positive law in particular points according to their own discretion, sometimes even going so far as to deny the validity of a positive provision because in their opinion it was contrary to the law of nature." Grueber, Introduction to Sohm, Institutes of Roman Law, 1 ed., xxv. In the same spirit likewise, in the classical writings on international law, which belong to the period of the law-of-nature school, what ought to be is regularly assumed to be the test of what is; "what is and what [the jurist] thinks ought to be law, theory and fact, law and so-called rules of nature and of right, are mixed up in a way at once confusing and misleading." Lord Russell, International Law, Rep. Am. Bar Ass'n, XIX, 253, 268.

<sup>76</sup> This conception and the next, which are closely connected, came into law and ethics through the influence of the Stoics, who held that *τὸ καθῆκον* was to be determined by reason. Following the Roman jurists, who gave a juristic development to Stoic ideas, morality was expounded as a system of laws, and it was conceived that obedience to these laws was the duty of man as a moral agent. Erdmann, History of Philosophy (Hough's transl.), I, 190; Zeller, Stoics, Epicureans and Sceptics (Reichel's transl.), 265, 287. Accordingly the classical Roman jurists insist upon "natural obligations" where one has relied on the good faith of another (Dig. L., 17, 84, § 1), although there is incapacity to contract according to the strict law (Dig. XII, 6, 13, pr., XII, 6, 38, § 2, XII, 6, 64) or the transaction fails of or has lost efficacy according to the strict law through some purely legal rule (Dig. XII, 6, 40, pr., IV, 5, 2, § 2, XLVI, 1, 8, § 3). In the same way the idea of duty plays the chief part in English equity. "Did the Chancellor ask what sort of right he was giving . . . did he ask himself under what rubric this new chapter would stand? Probably not. . . it is scandalous dishonesty if the feoffees disregard the trust." Maitland, Equity, 30. Similarly the moral obligation resting upon a "reasonable creature" is the stock notion of the seventeenth- and eighteenth-century jurist. Cf. Burlamaqui, Principes du droit naturel, pt. I, chap. 5, § 10.

arbitrarily defined legal person, as in the period of strict law.<sup>76</sup> In this period also natural law or equity insist not only upon the widest possible extension of capacity for rights, but also upon a like extension of capacity for legal transactions. Hence they insist on throwing off all incapacities for which a "natural" reason, as distinguished from a historical explanation, cannot be given, and on making possession of normal will and capacity for legal transactions coincident.<sup>77</sup>

A second is that the law should look to the substance and not the form, the spirit and not the letter,<sup>78</sup> a result of the measuring of things by reason rather than by arbitrary rule. Examples of the changes wrought in the law by this idea are infinite. In the Roman law<sup>79</sup> one may mention *restitutio* in case of *capitis deminutio* (civil death), *dominium in bonis* (equitable title) in case of *traditio* of a *res mancipi* without formal conveyance, equitable freedom in case of informal manumission by letter or before witnesses, *bonorum possessio secundum tabulas* where a will was produced attested by seven witnesses, although there was a defect in the formal ceremony *per aes et libram*. In Anglo-American law, one may mention the equitable doctrines as to mortgages, the doctrine that the security follows the debt, the equitable doctrines as to penal bonds, and reformation and rescission in case of mistake. This is perhaps the most revolutionary change in legal history. But only the systems that went through this change and came to measure things by reason, instead of solely by rule and formula, have become laws of the world.

A third idea is good faith, the idea that justice demands one should not disappoint well founded expectations which he has created, the idea that it is not so important that rules should be certain as that men's conduct should be certain. This idea, in law, flowed partly from the insistence upon reason and the substance of things, but chiefly from the identification of law with morals.

<sup>76</sup> Inst. II, 2, § 2; Dig. I, 5, 4, § 1, L, 17, 32, XXXVIII, 10, 4, § 2; Gaius, I, § 158.

<sup>77</sup> Inst. I, 3, § 2, I, 8, §§ 1-2; Gaius, I, §§ 144-145, 190; Grotius, II, 5, §§ 1-7; Maine, Early History of Institutions, chap. 11; Maine, International Law (American ed.), 126-127; Bryce, Studies in History and Jurisprudence (American ed.), 786-824; Ehrlich, Die Rechtsfähigkeit.

<sup>78</sup> Voigt, Das jus naturale, aequum et bonum und jus gentium der Römer, I, 321-323; Phelps, Juridical Equity, §§ 194-204.

<sup>79</sup> Gaius, I, § 158, II, §§ 40-41, 101-104, 115-117, 119, IV, § 36; Dig. IV, 5, 2, § 1.



For stability is a prime characteristic of moral conduct. In general we know today what moral conduct will be tomorrow. The unprincipled may or may not keep promises, may or may not pay debts, may or may not be constant in business or political or family relations. The term trustworthy, which we apply to one whose conduct is moral, speaks for itself. We say his word is as good as his bond. We have confidence in the stability of his course of life. In the stage of equity or natural law, there is an endeavor to make moral duties of good faith into legal duties, and it largely succeeds. In Roman law, through the words "whatever in good faith," inserted in the formula, except for formal contracts, where the action was *stricti iuris*, the obligation of contract came to be one of doing whatever good faith required in such a transaction.<sup>80</sup> Accordingly, in contrast with the formal contract of the strict law, in which the rule was in the words of the Twelve Tables, "as he declares orally, be that law,"<sup>81</sup> in the *negotia bonae fidei*, even where the promise was certain, the resulting *obligatio* was always uncertain. The parties were bound to perform what could be required fairly and reasonably under the circumstances of the case and certain duties were imposed upon them by the very nature of the transaction, whether expressly undertaken or not.<sup>82</sup> In English law, equity, insisting rigorously upon the utmost good faith and disinterestedness in the conduct of trustees, extended the requirement to all fiduciary relations and undertook to enforce specifically the duties of good faith which it held to be involved in such relations.<sup>83</sup> In the same spirit, the canon law insisted upon performance of agreements although they were not legally valid as contracts,<sup>84</sup> and the seventeenth and eighteenth century jurists, by means of the idea of natural law, induced the law of Continental Europe

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<sup>80</sup> According to Cicero, Q. Mucius Scaeuola, jurisconsult and *pontifex maximus* was wont to say that the greatest efficacy was to be found in those actions in which the words "in good faith" were used in the formula, that the name "actions of good faith" was of the widest application, being used in guardianships, partnerships, pledges, mandates, sales, and lettings and hirings, so that in these, as they admitted of set-offs and cross actions, it was the work of a strong judge to determine what each ought to perform for the other. *De Officiis*, III, 17, § 70.

<sup>81</sup> VI, 1. "Uti lingua nuncupassit ita ius esto."

<sup>82</sup> Sohm, *Institutionen des römischen Rechts*, 12 ed., § 76. See Ames, *Law and Morals*, 22 HARV. L. REV. 97, 106.

<sup>83</sup> See Maitland, *Equity*, 82-83.

<sup>84</sup> Sext, i, 18 (*de pactis*).

to throw over the Roman categories of contract and to hold all engagements or undertakings, entered into with the intention of creating an obligation, to be legally binding.<sup>85</sup>

A fourth idea is that one person should not be enriched unjustly at the expense of another. Partly this is a phase of looking at the substance rather than the form, an idea that one should not profit by the form if the substance fails. But chiefly it is a moral idea, an idea that justice involves an equivalency<sup>86</sup> and that it is dishonest to take something for nothing unless by way of an intended gift. This idea is behind nearly the whole law of quasi contract and, in our law, constructive trusts, the doctrines of equity as to merger, and subrogation. In the Roman law it is behind the innominate contracts, and similarly in our law of contracts, in the form of insuring the agreed equivalent, it is behind the doctrine of conditions implied in law and the corresponding doctrine of mutuality of performance in equity.<sup>87</sup>

On the other hand, the attempt to make law coincide with morals leads to two difficulties. One is an attempt to enforce over-high ethical standards and to make legal duties out of moral duties which are not sufficiently tangible to be made effective by legal means. An example of the former may be seen in the impossible standard of disinterestedness which equity imposed upon trustees until legislation intervened.<sup>88</sup> The attempt in Roman law to make gratitude into a legal duty will suffice as an example of the latter.<sup>89</sup> This tendency gradually remedies itself. The other

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<sup>85</sup> Grotius, bk. III, chap. 11, §§ 3-4; Pufendorf, *Law of Nature and Nations* (Kennet's transl.), bk. III, chap. 4; Burlamaqui, *Principes du droit naturel*, pt. I, chap. 7; Pothier, *Obligations*, pt. I, chap. 1, § 1.

<sup>86</sup> So that something of the same idea is behind our maxim "equality is equity" and the doctrine that equity will not aid a volunteer.

<sup>87</sup> On this idea, as a legal principle, see Ames, *Law and Morals*, 22 HARV. L. REV. 97, 106; Windscheid, *Lehrbuch des Pandektenrechts*, II, §§ 421-423; Planiol, *Traité élémentaire du droit civil*, II, § 812.

<sup>88</sup> See the Judicial Trustees Act (1896). "This statute in effect declares that trustees may, according to the existing law, be guilty of breaches of trust not only if they act honestly, but if they act reasonably. I do not think courts of equity would have admitted that this was so, though in truth they had (so to speak) *screwed up the standard of reasonableness to what many men would regard as an unreasonable height*." Maitland, *Equity*, 104.

<sup>89</sup> In Justinian's law, all gifts were revocable for ingratitude of the donee (Inst. II, 7, 2) unless the donee had rescued the donor from highwaymen or public enemies. Code, VIII, 56, 1 and 10. See Planiol, *Traité élémentaire du droit civil*, III, §§ 2637-



and the more serious difficulty is that the attempt to identify law and morals gives too wide a scope to judicial discretion, since whereas legal rules are of general and absolute application, moral principles must be applied with reference to circumstances and individuals. Hence at first in this stage the administration of justice is too personal and therefore too uncertain.<sup>90</sup> This over-wide magisterial discretion is corrected by a gradual fixing of rules and consequent stiffening of the legal system. Some moral principles, in their acquired character of legal principles, are carried out to logical consequences beyond what is practicable or expedient<sup>91</sup> so that a selecting and restricting process becomes necessary and at length the principles become lost in a mass of rules derived therefrom. Others are developed as mere abstractions and thus are deprived of their purely moral character.<sup>92</sup> In this

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2638; Pollack, *Der Schenkungswiderruf*, 96; Endemann, *Lehrbuch des bürgerlichen Rechts*, 9 ed., I, 1036.

<sup>90</sup> See my paper, *Justice According to Law*, 13 *Columbia L. Rev.* 696 (subdivisions I and IV).

<sup>91</sup> *E. g.*, the tendency of the older chancellors to make over bargains and testamentary gifts. *Drew v. Hanson*, 6 Ves. 675, 678. See also the observations of Sir Frederick Pollock on "the ingenuity of our equity judges in supplying provisions which testators and settlors have omitted to express." 24 *L. Quart. Rev.* 117. Also the older doctrine of equity as to the language which will create a trust. "In hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed." James, L. J., in *Lambe v. Eames*, L. R. 6 Ch. App. 597. Also the older doctrine that time could never be made of the essence merely by agreement. See Lord Thurlow in *Williams v. Thompson and Greyson v. Riddle*, Newland, *Contracts*, 2 ed., 238, 239. Compare the doctrine of *laesio enormis* in Roman law. Code, IV, 44, 2 and 9. As Judge Story well says, this begins by laying down "the broadest rule of equity and morals." Then the legislator, "struck with the unlimited nature of the proposition," turned it into a mathematical rule. *Equity Jurisprudence*, I, § 247.

<sup>92</sup> *Cf.* the rule of the French Civil Code as to *laesio enormis*: "If the vendor of an immovable has been damaged by receiving seven-twelfths less than its true price, he has the right to demand that the sale should be rescinded." Art. 1674. In our system, "modern equity," as it has been called, is full of examples of this mechanical treatment of what were once moral principles. *E. g.*, "Equity allows itself to be circumvented when it interferes with people's bargains. What Lord Compton has been charged is about ten per cent on the sum borrowed with compound interest. . . . If he had agreed to pay the £10,000 and ten per cent interest and there had been no agreement to insure, the appellants would have laid out half the annual amount for insurance, and on his death kept the sums insured. Can they be considered as having done that or its equivalent? *The resulting figures would have been the same.* I think not. *The rules of equity may be evaded but must not be infringed.*" Lord Bramwell in *Marquess*

way transition takes place to the next stage, which may be called the maturity of law.

It has been more usual to indicate the course of development which has been outlined above by dividing the history of law into four stages: (1) the stage of custom, coinciding with or resting on morality; (2) the stage of codified or crystallized custom, which, after a time, is outstripped by morality; (3) the stage of infusion of morality, in which, in consequence, the law becomes too fluid, and (4) by way of reaction, the stage of true legislation, another period of fixed law.<sup>93</sup> Such an outline, though true in its larger features, is based too exclusively upon Roman legal history. The term "custom" is open to objection, as inviting confusion between customary modes of decision or customary modes of advising litigants or expounding the law to tribunals and customary modes of popular action,<sup>94</sup> and it is only in Roman law that we may speak of the stage of strict law as one of codified or crystallized custom. In fact much of the Roman *ius civile* was developed juristically, with no more than a theoretical basis in the Twelve Tables, just as our strict common law was developed judicially. Moreover, it is doubtful whether the maturity of law is so much an era of true legislation as one of insistence upon law, that is upon rule and upon certainty, in comparison with the preceding stage, in which the insistence is on morals. But in any view the lines between the second and third and the third and fourth stages are sufficiently clear, and they have been recognized under one name or another by all who have written upon historical jurisprudence. A stage of hard and fast rule is followed by one of wide discretion in which moral ideas, developed outside of the law, supplant or make over a large part of the legal system. In time the doctrines that have been brought into the law in this infusion of morality become thoroughly legalized. As we put it in Anglo-American law, a system of equity is worked out. But

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of *Northampton v. Salt* [1892] A. C. 1. One cannot read this without feeling that the court was conscious of applying a technical rule which it had no intention of carrying a whit beyond its letter. It looked at the form of the transaction, not at the intention of the parties. Yet this technical rule against clogging the equity of redemption was originally a moral principle that forbade taking unconscientious advantage of a debtor's necessities.

<sup>93</sup> See Amos, *Science of Law*, chap. 3.

<sup>94</sup> Gray, *Nature and Sources of Law*, §§ 627, 628.



by the time this system has been completely achieved the doctrines of equity have all but lost any distinctively equitable character. A remarkable example is furnished by the course of decision which led up to the English Judicial Trustees Act. The principles of equity as to liability of trustees had become so well settled and were so fixed in their application that all room for discretion in a subject particularly requiring it was gone. As a result unconscionable beneficiaries were able to use the principles of equity to work injustice until the legislature was compelled to intervene. When a statute is necessary to make equity do equity and to prevent its doctrines from working wrong and oppression we have come a long way from the chancellor who said that the law of his court was in no wise different from the law of God. This becomes even more manifest when equity is assimilated to law in procedure and legal and equitable remedies are granted in the same cause and proceeding even though an attempt is made to distinguish and appropriate different classes of causes to law and equity respectively.<sup>96</sup>

Comparing the stage of equity or natural law with the preceding stage we may say that whereas the end in primitive law is public peace and in the period of strict law is security, in this stage it is an ethical solution of controversies; that whereas the means employed in primitive law is composition and in the strict law legal remedy, in this period it is enforcement of duty; and that to the contribution of primitive law, namely, the idea of a peaceable ordering of society, and to those of the strict law, namely, certainty and uniformity reached by rule and form, it adds the conceptions of good faith and moral conduct to be attained through reason.

## 5. THE MATURITY OF LAW.

As a result of the stiffening process by which the undue fluidity of law and over-wide scope for discretion involved in the identification of law and morals are gradually corrected, there comes to be a body of law with the stable and certain qualities of the strict law yet liberalized by the conceptions developed by equity or natural law. In this stage of matured legal system, the watch-

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<sup>96</sup> See my paper, *The Decadence of Equity*, 5 *Columbia L. Rev.* 20, 28-35.

words are equality and security. The former idea is derived partly from the insistence of equity or natural law upon treating all human beings as legal persons and upon recognizing full legal capacity in all persons possessed of normal wills, and partly from the insistence of the strict law that the same remedy shall always be applied to the same state of fact. Accordingly as used here, equality includes two things: equality of operation of legal rules and equality of opportunity to exercise one's faculties and employ one's substance.<sup>96</sup> The idea of security is derived from the strict law but is modified by the ideas of the stage of equity or natural law, especially the idea of insisting upon will rather than form as the cause of legal results and the idea of preventing the enrichment of one at the expense of another through form and without will. In consequence, security, as used here, includes two things: the idea that everyone is to be secured in his interests against aggression by others, and the idea that others are to be permitted to acquire from him or to exact from him only through his will that they do so or through his breach of rules devised to secure others in like interests.<sup>97</sup>

In order to insure equality, the maturity of law again insists strongly upon certainty and in consequence this stage is comparable in many respects to the stage of strict law. It is greatly in advance of the stage of strict law, however, because it insists not merely on equality of application of legal remedies, but on equality of rights, that is equality of capacities to influence others through the power of the state, and conceives of equality of application of legal remedies as only a means thereto.

To insure security, the maturity of law insists upon property and contract as fundamental ideas. This is brought out in our

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<sup>96</sup> On the idea of equality in the maturity of law, see Bentham, *Theory of Legislation*, *Principles of the Civil Code*, pt. 1, chap. 2; Clark, *Practical Jurisprudence*, 110-114; Stephen, *Liberty, Equality, Fraternity*, 189-255; Maine, *Early History of Institutions* (American ed.), 398-400; Miller, *Data of Jurisprudence*, 379-381; Lorimer, *Institutes of Law*, 2 ed., 375-414; Ritchie, *Natural Rights*, chap. 12; Röder, *Grundzüge des Naturrechts*, II, §§ 106-119; Lasson, *System der Rechtsphilosophie*, 376-377; Demogue, *Notions fondamentales du droit privé*, 136-142.

<sup>97</sup> On the idea of security in the maturity of law, see Bentham, *Theory of Legislation*, *Principles of the Civil Code*, pt. 1, chaps. 2, 7; Lorimer, *Institutes of Law*, 2 ed., 367-374; Gareis, *Science of Law* (Kocourek's transl.), 33; Demogue, *Notions fondamentales du droit privé*, 63-110.



American bills of rights. Thus, the Massachusetts Bill of Rights provides:

"Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property according to standing laws." <sup>98</sup>

Liberty in such connections was taken to mean in the nineteenth century, and is still sometimes taken to mean, that the individual shall not be held legally unless for a fault, unless for an act on his part which infringes another's right,<sup>99</sup> and that another shall not be permitted to exact of him except as and to the extent he has willed a relation to which the law in advance attached such power to exact.<sup>100</sup> The same idea appears in the modern Roman law in the insistence upon will as the central point in legal transactions<sup>101</sup> and the nineteenth-century attempt to make the Anglo-American law of contracts conform to the Roman conception<sup>102</sup> was quite in accord with the spirit of the time.

Along with liberty the maturity of law puts property, that is, the security of acquisitions. But one of these acquisitions may be a power to exact from a promisor. Accordingly contract acquires a property aspect. The law is regarded as existing to secure the right to contract freely and the right to exact a performance freely promised as widely as possible.<sup>103</sup> Moreover in this stage even personality acquires a property aspect.<sup>104</sup> The power of the individual

<sup>98</sup> Mass. Bill of Rights, art. X.

<sup>99</sup> *Ives v. South Buffalo R. Co.*, 201 N. Y. 271. See Wambaugh, *Workmen's Compensation Acts*, 25 HARV. L. REV. 129.

<sup>100</sup> "The whole idea is that of a domain in which the individual is referred to his own will and upon which government shall neither encroach itself nor permit encroachments from any other quarter." Burgess, *Political Science and Constitutional Law*, I, 174.

<sup>101</sup> "The conception of the legal transaction is a product of modern *Systematik*." Dernburg, *Pandekten*, I, § 91.

<sup>102</sup> See Harriman, *Contracts*, 2 ed., §§ 651, 652.

<sup>103</sup> "The privilege of contracting is both a liberty and a property right, and if A. is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B., C., and D. are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is denied the right to contract." *Frorer v. People*, 141 Ill. 171, 181 (passing on a statute against company stores).

<sup>104</sup> "For purposes of the civil law of defamation reputation is regarded as a species of property." Bower, *Code of Actionable Defamation*, 275. Compare the argument in *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, where the so-called right of

to make contracts freely is thought of primarily as a sort of asset. In other words, physical integrity and free motion and locomotion, physical and mental, are thought of as species of natural acquisitions,<sup>105</sup> as it were, so that the security of acquisitions, which is conceived to be the main end of the law, includes (1) natural acquisitions, that is, what nature has given one in the way of physical and mental powers, (2) what one has acquired through the position in which he found himself in society, and (3) what one has acquired through the free exercise of his natural powers. In the maturity of law men may be willing to agree that acquisitions of the second type shall be restricted greatly or even cut off for the future, but all idea of interfering with what has been so acquired in the past appears intolerable.<sup>106</sup> From the point of view of this stage of legal development, Mr. Choate was entirely justified when he said, in his argument in the Income Tax Cases, that a fundamental object of the law was "preservation of the rights of private property."<sup>107</sup>

Although it may be too soon to speak with assurance, the permanent contribution of the stage of maturity of law appears to be

privacy was in question, to the effect that "equity has no concern with the feelings of an individual . . . except as the inconvenience or discomfort which the person may suffer is connected with the possession or enjoyment of property."

<sup>105</sup> Compare the notion of natural incapacities to contract, to which the legislature cannot add new ones based upon modern industrial conditions. *State v. Loomis*, 115 Mo. 307, 315; *State v. Goodwill*, 33 W. Va. 179. Professor Terry has called attention to the "use of the word 'property' . . . to include almost all . . . actually valuable rights." *Leading Principles of Anglo-American Law*, § 350. Blackstone treats of contract in his subdivision "Rights of Things" as a mode of transferring property, bk. III, chap. 20.

<sup>106</sup> "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" Marshall, C. J., in *Fletcher v. Peck*, 6 Cranch, 87.

<sup>107</sup> 157 U. S. 429, 534. Compare Blackstone: "So great moreover is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the entire community. . . . Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property." *Commentaries*, II, 139-140. See also the remarks of Harlan, J., in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 239. It is of interest to note that Strong, J., in *Ex parte Virginia*, 100 U. S. 340, 347, inverts the order of words in the constitution and speaks of depriving another of "property, life or liberty without due process of law."



the idea of individual rights. As the strict law replaces the primitive idea of composition with the broader conception of legal remedy, of which composition, at best, can be no more than a species, and the stage of equity or natural law goes behind the idea of remedy to that of duty, which the remedy is but a means of enforcing, the maturity of law again goes deeper and finds behind each duty in private law a right to which the duty is correlative and for the maintenance whereof the duty is imposed. This is a thoroughly modern conception. The Romans spoke of actions *in rem* and *in personam*, we speak of rights *in rem* and *in personam*. At the very end of Roman legal development in the ancient world, the Digest was arranged in the order of the perpetual edict, in other words upon purely procedural lines.<sup>108</sup> In the same way, until the last quarter of the nineteenth century we taught and expounded the common law from the standpoint of actions and remedies rather than of rights. It is only a generation ago that the law of torts began to be emancipated from the bonds fixed by the actions of trespass and trespass on the case and to be expounded upon the basis of the legal rights secured.<sup>109</sup> As often happens in such connections, we are systematizing the whole law upon the basis of rights just as that conception is beginning to yield its central position in legal science because of the discovery of a more fundamental conception behind it.

Comparing the maturity of law with the stages which preceded it, the ends of law in this stage are equality of opportunity and security of acquisitions; the means employed is maintenance of rights; the contribution to the science of administering justice is the thorough working out of the idea of individual rights. In this stage individual rights are put at the foundation of the legal system, so that duties are but correlative thereto and remedies but vindications thereof. As has been said above, the all-important legal institutions of this stage are property and contract.

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<sup>108</sup> See Roby, Introduction to Justinian's Digest, xxxi-xxxiii.

<sup>109</sup> There is a curious parallel in the history of Japanese law. Japanese legal historians recognize three periods of development. "Until the third period [*i. e.*, the period of occidental influence] law was not clearly differentiated from social ethics; until 1868, indeed, there was no word in the Japanese language that expressed the idea of a legal right, a fact which indicates that social relations were viewed exclusively from the side of duty." Munroe Smith, *The Japanese Code and the Family*, 23 L. Quart. Rev. 42, 43.

6. THE SOCIALIZATION OF LAW.<sup>110</sup>

Toward the end of the nineteenth century a tendency became manifest throughout the world to depart radically from the fundamental ideas which had governed the maturity of legal systems. In 1891 Jhering<sup>111</sup> formulated it thus: "formerly," he said, there was "high valuing of property, lower valuing of the person;"<sup>112</sup> the line of growth was "weakening of the sense of property, strengthening of the feeling of honor."<sup>113</sup> In the maturity of law, the legal system seeks to secure individuals in the advantages given them by nature or their station in the world and to enable them to use these advantages as freely as is compatible with a like free exercise of their faculties and use of their advantages by others. As has been said, to accomplish these ends it reverts in some measure to the ideas of the strict law. In consequence a certain opposition between law and morals develops once more, and just as the neglect of the moral aspects of conduct in the stage of strict law required the legal revolution through infusion of lay moral ideas into law which in different legal systems we call the stage of equity or natural law, so the neglect of the moral worth of the individual and of his claim to a complete moral and social life, involved in the insistence upon property and contract in the maturity of law, are requiring a similar revolution through the absorption into the law of ideas developed in the social sciences.

Juristically the change began with the recognition of interests as the ultimate idea behind rights. It began when jurists saw that the so-called natural rights are something quite distinct in character from legal rights; that they are claims which human beings may reasonably make, whereas legal rights are means which the state

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<sup>110</sup> Jhering, *Scherz und Ernst in der Jurisprudenz*, 9 ed., 408-425; Charmont, *Le droit et l'esprit démocratique*, chap. 2 (*La socialisation du droit*); Pound, *Social Justice and Legal Justice*, Proc. Mo. Bar Ass'n, 1912, 110, 75 Cent. L. Jour. 455. See also Berolzheimer, *System der Rechts und Wirtschaftsphilosophie*, II, § 40; Gumplovicz, *Die soziologische Staatsidee*, 115 *et seq.*; Stein, *Die Soziale Frage im Lichte der Philosophie*, 2 ed., 336 *et seq.*

<sup>111</sup> In the additions to the fourth edition of his *Scherz und Ernst in der Jurisprudenz*. See the preface to the fourth edition in that or any subsequent edition.

<sup>112</sup> *Scherz und Ernst in der Jurisprudenz*, 9 ed., 418.

<sup>113</sup> *Id.*, 439. This states the matter well if by "honor" we understand the idea of the moral worth of the individual.



employs in order to give effect to such claims within certain defined limits. But when natural rights are put in this form it becomes evident that these individual interests are at most on no higher plane than social interests, and, indeed, for the most part get their significance for jurisprudence from a social interest in giving effect to them. In consequence the emphasis comes to be transferred gradually from individual interests to social interests.<sup>114</sup> Such a movement is taking place palpably in the law of all countries today. Its watchword is satisfaction of human wants, and it seems to put as the end of law the satisfaction of as many human demands as we can with the least sacrifice of other demands. This new stage of legal development may be called the socialization of law.

Let us leave the theory of this socialization of law for another place and look instead at what is actually going on in legal systems. Seven points appear especially noteworthy, namely, (1) limitations on the use of property and the so-called anti-social exercise of rights, (2) limitations on freedom of contract, (3) limitations on the *ius disponendi*, (4) limitations on the power of the creditor or injured party to exact satisfaction, (5) imposition of liability without fault, particularly in the form of responsibility for agencies employed, (6) change of *res communes* and *res nullius* into *res publicae*, and (7) insistence upon the interest of society in dependent members of the household.

In the growing tendency of the law to impose limitations upon the use of property, especially limitations designed to prevent what the French call abusive or anti-social exercise of rights, there is a suggestive parallel between the period upon which we are entering and the earlier period of liberalization which has been called the stage of equity or natural law. Equity sought to prevent the unconscientious exercise of rights; today we seek to prevent the anti-social exercise of rights. It is true analytically there is a logomachy in the phrase "abuse of rights" or "abusive exercise of rights." As it has been put, "the right ceases where the abuse begins."<sup>115</sup> But such criticisms come after the change

<sup>114</sup> As a striking example, compare the provisions as to exact proportional equality in taxation which were common in American state constitutions in the nineteenth century (*e. g.*, Const. Ind., 1851, art. X, § 1; Const. Ill., 1870, art. IX, § 1; Const. Mo., 1875, art. X, §§ 4, 6, 7) with the exemptions and graduation in recent taxation of incomes.

<sup>115</sup> Planiol, *Traité élémentaire du droit civil*, II, § 871.

has taken place and express what has been accomplished. After equity had interposed regularly to prevent certain unconscientious uses of certain rights or powers recognized by the strict law, it was possible for the analytical jurist to say that equity simply held down the exercise to the true scope of the right or power.<sup>116</sup> In the same way we may say today that what the law is doing is to define the right more accurately and circumscribe the action of the person entitled by the limits so defined. Equity imposed moral limitations. The law today is beginning to impose social limitations. It is endeavoring to delimit the individual interest better with respect to social interests, and to confine the legal right to the bounds of the interest so delimited. One example may be seen in the development of legal doctrine as to acting or building upon one's land with the sole motive of injuring another.<sup>117</sup> The strict law starts with the proposition announced by Gaius: "no one is held to act wrongfully who exercises his right."<sup>118</sup> In the classical jurists, because of the identification of law with morals, a tendency develops to qualify such statements by adding "provided he does this, not with the intention of injuring his neighbor, but in order to improve his land,"<sup>119</sup> or "but malice is not to be indulged."<sup>120</sup> The old French law proceeded upon a theory of the "free exercise of rights;" in contrast with which the recent theory of "abusive exercise of rights" has arisen. The German code expressly forbids the use

<sup>116</sup> "The question depends entirely upon the legal effect to be given to the words 'without impeachment of waste,' and that cannot depend upon the kind of court in which the question happens to arise. Yet the practical consequence of this diversity of views is that there is a remedy in equity against the tenant . . . while there is none at law; and this gives to the act of the tenant the semblance of being an equitable tort. In truth, however, the act is a legal tort, if the view taken by courts of equity is correct." Langdell, *Brief Summary of Equity Jurisdiction*, 251-252. Analytically this is true. But the chancellors "set up a superior equity" (Lord Hardwicke in *Rolt v. Somerville*, 2 Eq. Cas. Abr. 759, pl. 8) and interfered to prevent "an unconscientious use . . . of a legal power."

<sup>117</sup> Ames, *How far an Act may be a Tort because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411; Walton, *Motive as an Element in Torts in the Common and in the Civil Law*, 22 HARV. L. REV. 501; Wigmore, *Cases on Torts*, II, App. A, §§ 262, 271-272; Stoner, *The Influence of Social and Economic Ideals on the Law of Malicious Torts*, 8 MICH. L. REV. 468; Cosack, *Lehrbuch des deutschen bürgerlichen Rechts*, I, § 77; Planiol, *Traité élémentaire du droit civil*, II, §§ 870-871; Charmont, *L'abus du droit*, *Revue trimestrielle du droit civil*, I, 113; Porcherot, *De l'abus du droit*; Salanson, *De l'abus du droit*.

<sup>118</sup> Dig. L, 17, 55.

<sup>119</sup> Dig. XXXIX, 3, 1, § 12 (Ulpian).

<sup>120</sup> Dig. VI, 1, 38 (Celsus).



of property for the sole purpose of injuring another.<sup>121</sup> American case law is veering steadily to the same conclusion.<sup>122</sup> Another example may be seen in the change of front in American case law with respect to surface water and to percolating water, and the establishment of doctrines in which a principle of reasonable use has superseded the old and narrow idea that the owner of the surface might do as he pleased.<sup>123</sup> Legislative extensions of this doctrine of reasonable use of property are probably imminent. Limitations upon building which proceed, not on the interest in general security, but on a newly recognized social interest in the aesthetic, are involved in the widespread movement against bill boards.<sup>124</sup> Some, indeed, contend for more:

"It is probable," says Professor Jenks, "that we shall eventually make provisions that the houses along certain residence streets shall conform to the artistic sense of the community as expressed by the building inspectors."<sup>125</sup>

But except in the case of water upon or beneath the surface noted above, the judicial development has gone no further than to denounce the exercise of what would otherwise be rights merely to gratify spite and malice.<sup>126</sup> Gratification of spite and malice are not individual wants which the law is designed to satisfy. The law should not secure such an interest. More and more the tendency is to hold that what the law should secure is satisfaction of the owner's reasonable wants with respect to the property — that is, those which consist with the like wants of his neighbors and with the interests of society.

Limitations upon freedom of contract have been imposed both

<sup>121</sup> § 226.

<sup>122</sup> See *Barger v. Barringer*, 151 N. C. 433 (1909), and the cases cited in the majority and dissenting opinions respectively.

<sup>123</sup> "The spirit of the English law is now to leave the parties alone; of the American law, it is, on the one hand, to permit a reasonable use of land by all, and on the other, to prohibit an excessive use by any." Wiel, *Water Rights*, 3 ed., I, § 744, note 12. See Huffcut, *Percolating Waters; The Rule of Reasonable User*, 13 *Yale L. Jour.* 222.

<sup>124</sup> Bill Board and other Forms of Outdoor Advertising, *Chicago City Club Bulletin*, vol. V, no. 24.

<sup>125</sup> *Governmental Action for Social Welfare*, 81.

<sup>126</sup> The German code makes this into a general principle governing the exercise of all legal rights, § 226. *Cf.* a similar suggestion in *Dunshee v. Standard Oil Co.*, 152 *Ia.* 218. But see the note on this case, 25 *HARV. L. REV.* 296.

through legislation and through judicial decision. As examples of the former, reference may be made to statutes requiring payment of wages in cash, statutes regulating hours and conditions of labor, and statutes preventing interference with membership in labor unions.<sup>127</sup> Here again the parallel between the present stage of the law and the stage of equity or natural law is suggestive. The purpose of this legislation is to protect a class which is subjected to severe economic pressure against unfair advantage on the part of employers. In the same way equity sought by limiting their power of contract, to protect debtors against unfair advantage on the part of creditors. Thus, equity prevented clogs upon or bargainings away of the right of redemption<sup>128</sup> and overturned oppressive contracts with heirs or reversioners.<sup>129</sup> Equity insisted on moral conduct on the part of creditors; we now insist on social conduct on the part of employers. We insist upon protecting men against themselves so as to secure the social interest in the full moral and social life of every individual. In the law of insurance, legislation and judicial decision have co-operated to limit freedom of contract. Statutes, such as valued policy laws, provisions as to warranties and standard policy laws, have taken many features of the subject out of the domain of agreement and the tendency of judicial decision has been in effect to attach rights and liabilities to the relation of insurer and insured and thus to remove insurance from the category of contract.<sup>130</sup> Likewise the courts have taken the law of surety companies practically out of the category of

<sup>127</sup> Pound, *Liberty of Contract*, 18 *Yale L. Jour.* 454; Goodnow, *Social Reform and the Constitution*, 242-258; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 566-575. See Jastrow, *Was ist Arbeiterschutz?* *Archiv für Rechts- und Wirtschaftsphilosophie*, VI, 133, 317, 322. Probably we shall soon have to add to the foregoing legislation with respect to non-living wage, minimum wage, wage boards, and the like. See Brown, *Underlying Principles of Modern Legislation*, 316-321.

<sup>128</sup> See the discussion of this doctrine in *Noakes v. Rice*, [1902] A. C. 24, [1900] 2 Ch. 445. "This court, as a court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." Lord Northington in *Vernon v. Bethell*, 2 Ed. 110, 113 (1761).

<sup>129</sup> *Earl of Chesterfield v. Janssen*, 2 Ves. Sr. 125.

<sup>130</sup> See Wambaugh, *Cases on Insurance*, preface.



suretyship, treating them as insurers rather than as sureties.<sup>131</sup> More important, judicial decision has established that the duties of public service companies are not contractual, flowing from agreement, but quasi-contractual, flowing from the calling in which the public servant is engaged.<sup>132</sup> Here again, comparison should be made with the restriction of free contract by equity.<sup>133</sup>

Limitations on the *ius disponendi* are chiefly statutory. Four examples may be noted: the requirement in many states that the wife join in a conveyance of the family home even though it is the sole property of the husband,<sup>134</sup> the spendthrift trust, sometimes legislative, but chiefly judicial in origin,<sup>135</sup> legislation requiring that the wife join in a mortgage of the household furniture by the husband, even though it is his sole property<sup>136</sup> and legislation requiring that the wife join in an assignment of the husband's wages.<sup>137</sup> In all these cases the social interest in the moral and social life of each individual has outweighed individual interests of substance. In the first, second and third, however, the social interest in security of the social institutions of marriage and the family have also weighed heavily.

<sup>131</sup> Compare *American Bonding Co. v. Ottumwa*, 137 Fed. 572, and *Segari v. Mazzei*, 116 La. 1026, with *United States v. Boecker*, 21 Wall. 652.

<sup>132</sup> Wyman, *Public Service Companies*, I, § 331. Professor Wyman says of this: "It may once have been the ideal of industrial freedom that a man might do as he pleased with his own, in any event that is no longer our notion of social justice." *Id.*, § 35, preface (p. ix). Again: "Individual freedom is limited by the modern notion of social justice." *Id.*, § 35.

<sup>133</sup> Some tendency has been manifest to deal in a similar way with certain classes of contracts between ordinary individuals, e. g., the course of decision in New York as to express conditions in building contracts. "Because the right to contract as one chooses is in general sacred in the eyes of the common law, we start with the proposition that express conditions, having been put into the contract by the parties, must be strictly complied with." Costigan, *Conditions in Contracts*, 10. In New York, however, such conditions are treated as if they were not imposed by the parties but were like the conditions "implied in law," which are imposed by the law. *Nolan v. Whitney*, 88 N. Y. 648; *Doll v. Noble*, 116 N. Y. 230.

<sup>134</sup> Thompson, *Homesteads and Exemptions*, § 465.

<sup>135</sup> Gray, *Restraints on the Alienation of Property*, 2 ed., viii-ix. While the justification of the spendthrift trust, so far as it may be justified, is to be found in the social interests behind these limitations upon the *ius disponendi* and those upon the power of the creditor to exact satisfaction presently to be considered, it is a very crude device to those ends and thoroughly deserves Professor Gray's strictures.

<sup>136</sup> Ill. Rev. St. 1909, chap. 95, § 24.

<sup>137</sup> Mass. Acts of 1908, chap. 605.

Limitations of the power of the creditor or injured party to exact satisfaction have a longer history. Roman law in the classical period developed two limitations of this sort, *cessio bonorum* and the *beneficium competentiae*. *Cessio bonorum* was a voluntary surrender of the debtor's property to his creditors. By making such a surrender, he escaped the *infamia* that attended universal execution against a debtor's property, escaped execution against his person, and obtained the *beneficium competentiae* as to after-acquired property.<sup>138</sup> Thus it was a sort of voluntary bankruptcy, except that there was no general discharge. The *beneficium competentiae* is more important for our purpose. In the case of certain debtors, as against certain creditors, the Roman law in the classical period gave the benefit or privilege of not being held for the entire amount but only for so much as they could pay for the time being. Later it was held that this meant what they could pay without depriving themselves of the means of subsistence. The chief cases were, claims of one partner against another, actions by a child against a parent, actions by a freedman against his patron or an ascendant or descendant of the latter (because of the duty of gratitude), and actions by the wife against the husband for *dos*.<sup>139</sup> With respect to the first of these cases, it should be explained that the original of partnership was the *consortium* of co-heirs.<sup>140</sup> Hence the idea in each case was that it was contrary to morals for the one to strip the other of all his property and leave him a pauper. But there seemed no objection to a stranger doing this, except as the debtor might avoid it by *cessio bonorum*. Naturally even this doctrine was rejected in the modern civil law as being out of accord with the individualism of the eighteenth and nineteenth centuries. Thus Baudry-Lacantinerie says:

"Suppose I am creditor of a person to whom I am bound to furnish support, if he becomes needy; I seize his property in order to obtain payment; can he meet me with what the commentators on the Roman law call the *beneficium competentiae*, and so bring it about that he be held only in *id quod facere potest* and retain what he requires to live, *ne egeat*? No. Because I owe support to a person it does not follow that I am bound to leave to him enough wherewith to live. I may take

<sup>138</sup> Dig. XLII, 3, 4, pr.; Code, VII, 71, 1; II, 11, 11.

<sup>139</sup> Dig. XLII, 1, 16, § 17; XLII, 1, 19, § 1; L, 17, 173.

<sup>140</sup> See Roby, Roman Private Law, II, 128, note 1.



everything from him, if necessary in order that I be paid, except that I may be bound thereupon to provide for his support if his own labor does not suffice to procure a living. It would require a formal text in order to limit the rights of a creditor with respect to his debtor to whom he owes support and no such text exists. Hence a son who is creditor of his father may proceed against him as he might against the first comer; he may pursue him *usque ad saccum et peram*. It is an impiety — but our law tolerates it.”<sup>141</sup>

The whole spirit of nineteenth-century law is in this passage.

The German code has a number of modern provisions restricting the power of the creditor to exact satisfaction which are likened to the *beneficium competentiae* but which really often proceed more upon the newer ideas as to social justice than upon the idea of preventing impious conduct involved in the Roman doctrine. Some of these cases are, the defense to a *pactum donationis* (executory gift) that performance would impair the donor's means of living according to his station, the defense of a donee to a donor's suit for revocation of a gift that restoration would affect the donee's means of living according to his station, the power of a donor to revoke within a fixed time on the same ground, the limitation upon the liability of insane persons for torts (introduced by the code) by a proviso that the liability shall not extend to depriving him of the means of support, and the like limitation upon the duties of maintenance of ascendants and descendants.<sup>142</sup>

In the United States, at a relatively early date, legislation providing for exemptions from execution began to impose limitations intended to secure social interests upon the power of the creditor to exact satisfaction. Instances of this are the homestead exemptions which prevail in so many states, the personalty exemptions, which in some states go so far as to exempt \$500 to the head of a family and usually make liberal exemptions of tools to the artisan, library and instruments to the professional man, and animals and implements to the farmer, and the wage exemptions, which often go so far as to put sixty days' wages to the head of a family beyond the reach of legal process.<sup>143</sup> There is a notable tendency

<sup>141</sup> Précis du droit civil, 10 ed., I, § 529.

<sup>142</sup> German Civil Code, §§ 528-529, 829.

<sup>143</sup> Thompson, Homesteads and Exemptions, §§ 40, 379; Bureau, Le Homestead ou l'insaisissabilité de la petite propriété foncière. In Germany, claims for wages, claims

in recent legislation and in recent discussion to insist, not that the debtor keep faith in all cases even though it ruin him and his family, but that the creditor must take a risk also, either along with or even in some cases instead of the debtor.

Primitive law, acting on the principle of buying off the desire for revenge, said Ames in 1908,

"asked simply, 'did the defendant do the physical act which damaged the plaintiff.' The law of today, except in certain cases based upon public policy, asks the further question, 'was the act blameworthy.' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril."<sup>144</sup>

But the ethical standard of which he wrote, which came into the law in the period of infusion of morals, was an individualist ethical standard. Today there is a strong and growing tendency to revive the idea of liability without fault, not only in the form of wide responsibility for agencies employed, but in placing upon an enterprise the burden of repairing injuries without fault of him who conducts it, which are incident to the undertaking. There is a strong and growing tendency, where there is no blame on either side, to ask, in view of the exigencies of social justice who can best bear the loss, and hence to shift the loss by creating liability where there has been no fault. The whole matter of workmen's compensation and employer's liability, as dealt with in modern legislation, illustrates this.<sup>145</sup> The basis of such legislation is the social interest in the full moral and social life of the individual in classes that are less able to bear the burden of injuries incident to their tasks.

Again, it used to be laid down, and the doctrine came from the Roman law, that certain things, such as running water, were *res communes*, that is, no one could own them; but the use of them belonged to or could be appropriated by certain individuals, and

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under the laws as to compulsory insurance and claims for maintenance are exempt from seizure. Code of Civil Procedure, § 850.

<sup>144</sup> Law and Morals, 22 HARV. L. REV. 97, 99.

<sup>145</sup> Wambaugh, Workmen's Compensation Acts, 25 HARV. L. REV. 129; Opinion of the Justices, 209 Mass. 607; State v. Clausen, 65 Wash. 156; Borgnis v. Falk, 147 Wis. 327. See Ives v. South Buffalo R. Co., 201 N. Y. 271. Another illustration may be seen in the movement in England to abolish the defense of compulsory pilotage in cases where a collision is caused by the fault of a pilot carried under compulsion of law. See Law Times, Feb. 15, 1913, vol. 134, p. 392.



that certain other things were *res nullius*, that is, they belonged to no one until some one reduced them to his possession, and then they belonged to him. Wild animals were of the latter class. Recently a strong tendency has arisen to regard running water and wild game as *res publicae*; to hold that they are owned by the state, or better, that they are assets of society which are not capable of private appropriation or ownership except under regulations that protect the general social interest.<sup>146</sup> It is too early to say just how far this tendency will go. But it is changing the whole water law of the western states.<sup>147</sup> It means that in a crowded world the social interest in the use and conservation of natural media has become more important than individual interests of substance.

Finally recent legislation, and to some extent recent judicial decision, have changed the attitude of the law with respect to dependent members of the household. Courts no longer make the natural rights of parents with respect to children the chief basis of their decisions. The individual interest of parents, which used to be almost the one thing regarded, has come to be almost the last thing regarded as compared with the interest of society. The interest of the child is now thought of rather as the interest of society in the full development of the child. In other words, here also social interests are now chiefly regarded.<sup>148</sup>

It is now in order to consider the end of law as developed in juristic thought. This subject is reserved for a subsequent paper.

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<sup>146</sup> See the statutes in Wiel, *Water Rights*, 3 ed., I, §§ 6, 120; *Ex parte Bailey*, 155 Cal. 472; *Geer v. Connecticut*, 161 U. S. 519.

<sup>147</sup> See the *Water Code for Washington* (1913), §§ 1, 2. Compare also recent decisions as to flood water. Wiel, *Water Rights*, 3 ed., I, § 347; *Gallatin v. Corning I. Co.* (Cal., 1912), 126 Pac. 864.

<sup>148</sup> Mack, *The Juvenile Court*, 23 HARV. L. REV. 104; Breckinridge and Abbott, *The Delinquent Child and the Home*, chaps. 2, 11.

For another instance of the change of front which has taken place in this respect, compare the older and newer cases as to constitutionality of drainage and reclamation laws and the like.

## SEQUEL TO WORKMEN'S COMPENSATION ACTS.<sup>1</sup>

THE object of this paper is to give notice of an impending question of great importance; not to give an answer to the question, but to show how and why it arises at the present time.

There is a movement now going on in this country for the enactment of legislation based upon the principle of the English Workmen's Compensation Act.<sup>2</sup> This legislation is founded largely upon a theory inconsistent with the fundamental principle of the modern common law of torts. As to a considerable number of the accidents covered by some of the recent statutes, the results reached under the statute would be absolutely irreconcilable with results reached at common law in cases outside the scope of the statute. This incongruity must inevitably provoke discussion as to the intrinsic correctness of the modern common law of torts; and is likely to lead, either to a movement in favor of repealing the statutes, or to a movement in favor of making radical changes in the common law.

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<sup>1</sup> The Workmen's Compensation laws enacted in American States "all differ materially in detail and not infrequently in substance;" but they all "may be said to be pointed in the same general direction." 6 Maine Law Review, 283. "The wording of each is different from any of the others. . . . There is a great diversity as to those who come within the provisions of the various acts, the amounts paid and the manner of administering the statutes, while all the acts, *in principle*, accomplish the same result." Bradbury's Workmen's Compensation, Introduction, XI.

In foreign legislation on this topic, there are various systems. "The details of these systems vary in the different countries, but one principle underlies them all and gives a certain degree of unity to all such laws, however much they may differ in form or in method of operation." Report of Massachusetts Commission on Compensation for Industrial Accidents, A. D. 1912, p. 55.

<sup>2</sup> See the initial English statute of 1897, 60 & 61 Vict., ch. 37; and the more sweeping statute of 1906, 6 Edward 7, ch. 58. "The substitution of the words 'employer' and 'workman,' for the words familiar to the common law, 'master' and 'servant,' serves to illustrate rather a social than a legal change." . . . "It may be interesting to note the transition from the legislative use of one phrase to the other. The Master and Servant Act, 1867 (30 & 31 Vict., ch. 14), is the last of a long series, as may be seen from the schedule, where the term master and servant is employed. The Employers and Workmen Act, 1875, (38 & 39 Vict., ch. 90), is the starting point of the new nomenclature." Beven, Law of Employers' Liability and Workmen's Compensation, 3 ed., p. 5, and p. 6, note (a).



In the present movement for the enactment of such legislation, the discussion in this country has turned largely on two questions:

1. Whether justice to workmen requires the passage of such a statute?

2. Whether a proposed statute would conflict with the constitution of a state or of the United States?

Assume, for present purposes, that the first question is answered in the affirmative and the second question in the negative.<sup>3</sup>

If a proposed statute is enacted and held valid, then we predict that legislators and judges will immediately be confronted by a third question:

3. Does not justice require a further change in the law, so as to put certain persons other than workmen upon an equality with workmen?

How, and why, does this question arise?

The Workmen's Compensation Act provides for compensation (on a limited scale) by an employer to his workmen when they are damaged in the conduct of the business by pure accident; *i. e.*,

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<sup>3</sup> If any serious difficulties exist under the present constitutions, they are likely to be removed by constitutional amendments. The New York Act of June 25, 1910, was held unconstitutional in *Ives v. South Buffalo R. Co.*, 1911, 201 N. Y. 271. Thereafter the following constitutional amendment was adopted; having been passed by two successive legislatures in 1912 and 1913, and having been approved by vote of the people at the state election in November, 1913. See New York Laws, 1913, vol. 3, pp. 2220, 2226; amendment to article one of the constitution by adding a new section, 19.

"Section 19. Nothing contained in the constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

without fault on the part of any one.<sup>4</sup> But if an outsider, or a paying customer of the business, is damaged by pure accident in the conduct of the business, they have generally no remedy at all against the owner of the business. If no further change is made in the law (either by legislation or judicial decision), workmen will constitute, in effect, a specially protected class, and great incongruities will exist.

Witness the following examples:

Example 1. Collision on highway between trolley car and A.'s wagon driven by its owner. Collision not due to fault of any one. Three persons suffer damage: the owner of the wagon, a paying passenger on the car, and the motorman.<sup>5</sup>

The motorman recovers, under the statute, partial compensation from the owner of the trolley line, his employer. Neither the wagon owner, nor the passenger, can recover against the owner of the trolley line.<sup>6</sup>

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<sup>4</sup> The English Act of 1906 "extended the principle of compensation to cover certain industrial diseases."

<sup>5</sup> It is believed that, in the case of a trolley line on the surface of the highway, accidents damaging to outsiders and to passengers are more frequent than accidents damaging to employees.

The following figures have been furnished by the counsel of a large trolley road. The first column gives the percentage of claims made before a Compensation Act became effective, and the second column gives the percentage after that time.

	Before	After
Percentage of the claims made by employees . . . . .	1.8	4.3
Percentage of claims made by passengers (estimated) . . . . .	78.	74.
Percentage of claims made by others (pedestrians, teamsters, etc.) . .	20.2	21.7
	100.00	100.00

Of course the whole number of passengers carried far exceeds the whole number of employees. But an employee is generally exposed to the perils of the traffic more frequently and more continuously than a passenger. The passenger is carried once or twice a day; while the employee is likely to be on the trains a large part of each day. See Buckley, L. J., in *Pierce v. Provident Clothing Co.* L. R. [1911] 1 K. B. 997, 1003. Compare 25 HARV. L. REV. 533-535.

Some part of the tracks of the trolley road above referred to run in subways, and another part is elevated. As to both of these, accidents to outsiders are rare as compared with that part of the road where the tracks run on the surface of the highway.

<sup>6</sup> As to the common-law duty and liability of a Street Railway Company to passengers, see 1 Nellis on Street Railways, 2 ed., §§ 274, 275; 4 Elliott on R. R., 2 ed., § 1402; *Newberry v. Bristol, etc. Tramway Co.*, Court of Appeal, Dec. 20, 1912, 99 Times Law Reports, 177; *Raymond v. Portland R. Co.*, 1905, 100 Me. 529, 532-535; *Pitcher v. Old Colony Street R. Co.*, 1907, 196 Mass. 69.

As to the common-law duty and liability of a street railway company to persons



Example 2. Collision on highway between automobile managed by the owner's hired chauffeur and A.'s wagon driven by A. Collision not due to fault of any one. The chauffeur and A. are both hurt. The chauffeur recovers (under the statute) partial compensation from the owner of the automobile. A. cannot recover against the owner of the automobile.<sup>7</sup>

Example 3. Collision on highway between trolley car and wagon driven by its owner. The collision was due in part to the negligence of the wagon driver and in part to the simultaneous negligence of the motorman. The negligence of each consisted in failing to use ordinary care. The motorman and the wagon driver were both hurt. The wagon driver's contributory negligence is a bar to his recovery against the owner of the trolley line. The motorman's contributory negligence does not prevent his recovering (under the statute) partial compensation from the owner of the trolley line.<sup>8</sup>

Example 4. Steam boiler in machine shop exploded without fault of any one. A workman in the shop was hit by a fragment of the boiler. The windows in the neighboring building of X. were broken by fragments of the boiler. Both results were consequences to be reasonably anticipated if an explosion took place. The workman can recover (under the statute) partial compensation from the owner of the shop, his employer. X. has no remedy against the owner of the shop.<sup>9</sup>

These very inconsistent results are due to the fact that the rule of liability adopted by the statute (liability for damage irrespective of fault) is in direct conflict with the fundamental rule of the modern

other than passengers and employees, see 2 Nellis on Street Railways, 2 ed., § 369; 3 Elliott on Railroads, 2 ed., §§ 1096, c. b. 1096, c. g.

<sup>7</sup> That A. cannot recover; see Huddy on Automobiles, 2 ed., pp. xi, 27, 29; *Steffen v. McNaughton*, 1910, 142 Wis. 49, p. 52; *Lewis v. Amorous*, 1907, 3 Ga. Appeals, 50, p. 55; *Jones v. Hoge*, 1907, 47 Wash. 663, p. 665; *Cunningham v. Castle*, 1908, 127 N. Y. App. Div. 580, p. 586; 3 *Shearman & Redfield on Negligence*, 6 ed., §§ 653 a and 653 b.

<sup>8</sup> Under the English Act of 1897, the workman's action is not barred by his contributory negligence, if such negligence falls short of "serious and wilful misconduct."

<sup>9</sup> X. would undoubtedly fail to recover in New York and New Jersey, and probably in most of the United States. See *Losee v. Buchanan*, 1873, 51 N. Y. 476; *Marshall v. Welwood*, 1876, 38 N. J. L. 339.

Query. Would an English court allow X. to recover upon the principle stated by *Blackburn, J.*, in *Fletcher v. Rylands*, [1866], L. R. 1 Exch. 265, p. 279?

common law as to the ordinary requisites of a tort. In truth, the statute rejects the test prevailing in the courts in A. D. 1900, and comes much nearer to endorsing the test which used to prevail in A. D. 1400. In these modern days, the fundamental common-law rule as to the requisites of a tort is, that there must be fault on the part of the defendant; either wrong intention or culpable inadvertence. In early times, it was enough if the defendant's act occasioned the damage to the plaintiff; although the act might be entirely blameless. The courts did not require an ethical basis for liability.<sup>10</sup> Gradually the law, as declared by the judges, has come round to a view exactly opposite to the ancient doctrine.<sup>11</sup>

It is sufficient for present purposes to state here what the modern common law on this point actually is. It is not now necessary to consider which is intrinsically the more correct, the ancient or the modern common law; nor to trace the various stages by which, and the various dates at which, the change has been gradually brought about. Even those who think that the change was not completed until a quite recent date,<sup>12</sup> practically admit that it is now settled doctrine in the courts. Professor Bohlen calls the change an "astounding revolution," "an innovation;" but he also says that it is "an innovation now some four hundred years old." See 59 *Univ. Pa. Law Review*, 450, 451.<sup>13</sup>

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<sup>10</sup> See Prof. Ames, 22 *HARV. L. REV.* 99; Prof. Wigmore, 7 *HARV. L. REV.* 317; 1 *Pollock & Maitland, History of English Law*, 2 ed., 54.

<sup>11</sup> See Prof. Ames, 22 *HARV. L. REV.* 100; Kenny, *Cases on Torts*, 146, note. Compare Holmes on the Common Law, 89-107.

<sup>12</sup> See Prof. J. P. Hall, 19 *Journal Pol. Econ.* 698.

<sup>13</sup> Without going into an extended discussion of the comparative merits of the ancient and modern views, it may be remarked that some of the reasons given by judges in favor of either view are open to criticism. There has been a tendency, both in ancient and modern times, to regard the interest of only one of the two immediate parties to the controversy. Formerly, courts sometimes seemed to consider only the innocent plaintiff. More recently, they sometimes appear to consider only the innocent defendant. Anciently the courts were often impressed with the hardship of leaving the innocent plaintiff to bear the entire loss; and hence they imposed the pecuniary burden of bearing the entire loss upon the innocent defendant; overlooking the fact that they were thus simply shifting the entire burden from one innocent party to another equally innocent party. See Doe, J., in *Brown v. Collins*, 1873, 53 N. H. 442, 445, 446. In modern times, the courts have often been impressed with the hardship of compelling the innocent defendant to shoulder the entire loss, and hence they have left the innocent plaintiff to bear it alone. It sometimes seems to be assumed that there is no possible middle ground; that either the plaintiff can recover nothing, or the defendant must be held liable for the entire damage. Professor Whittier, how-



To the above-described modern general rule there are a number of well-recognized exceptions, covering a good deal of ground.<sup>14</sup> For some of these exceptions there are distinct and sufficient reasons, founded on considerations of public policy. Two of these exceptions specially concern the present inquiry, and will be referred to later. They are: the doctrine sometimes called the rule of *respondeat superior*; and the rule of absolute liability for extra-hazardous uses or conduct.

The initial English Workmen's Compensation Act, enacted in 1897, takes "a wholly new departure." It "takes the new line of creating a duty on the part of employers to compensate workmen" for accidental damage, irrespective of any fault on the part of their employers or their fellow servants. There is "no need to prove any negligence" of employers; "and the workman loses his right by nothing short of his own 'serious and wilful misconduct' being the cause of the accident."<sup>15</sup> The act covers "personal injury by accident arising out of and in the course of the employment."<sup>16</sup> The workman is not allowed full damages; his recovery being limited to partial compensation, which is generally proportioned to the wages he received. Upon a rough estimate he often receives

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ever, has said: "If the law is to do anything in such cases, the sensible thing would be to divide the loss equally between the parties concerned." He adds: "The common law does not do this. The reasons no doubt are historical." 15 HARV. L. REV. 335. He is here speaking of cases where losses have been incurred through pure accident, *i. e.*, when neither party was in fault. The idea of dividing the loss *where both are in fault* has been adopted by many maritime courts. It should also be noticed that some modern judges are inclined to look, not merely at the interest of the immediate parties to a controversy, but also to consider the interest of the general public. Thus the modern doctrine—that fault is requisite to liability—has been upheld in certain cases on the ground that it is for the general interest of the community that traffic and building operations should be carried on; and that the imposition of absolute liability upon the actor would tend to discourage the doing of such acts. See Holmes, J., in *Quinn v. Crimmings*, 1898, 171 Mass. 255, 258. Doe, J., in *Brown v. Collins*, 1873, 53 N. H. 442, 448, 450; Holmes on Common Law, pp. 94-96, as to the expediency of letting loss by accident lie where it falls.

<sup>14</sup> See condensed summary of exceptions; Prof. J. P. Hall, 19 Journal Pol. Econ. 698-700; also Pollock, *Essays in Jurisprudence*, 119-120.

<sup>15</sup> See Pollock, *Torts*, 6 ed., 95, 104-105.

<sup>16</sup> This provision in the English acts of 1897 and 1906 has been substantially copied in many of the American statutes. But in the statutes of some American states, and in the U. S. Act. of May 30, 1908, the words "out of and" are omitted. As to the expediency of making this omission, compare Mr. Lowell, 3 Amer. Economic Review, 189-190, and Prof. Bohlen, 25 HARV. L. REV. 546.

about half damages; and the statute is sometimes defended on the ground that it practically "divides the loss" between the workman and his employer. The English Act of 1897 applied only to certain specified occupations. But the later English Act of 1906 extends, with comparatively trifling exceptions, to the workmen in "any" employment.<sup>17</sup>

Whence arose the movement for such revolutionary legislation?

It is largely due to the introduction, in recent times, of new methods of industry. The use of modern agencies, especially steam and electricity, led to great changes in the modes of manufacturing and

<sup>17</sup> The English statute, in terms, imposes upon *the employer* the burden of paying to the workman the compensation therein prescribed. It has, however, been said that, while the employer is thus made the primary paymaster, yet the burden can be, and is, shifted by him onto the shoulders of the consumer of the product. "The industry," it is urged, ought to bear, in whole or in part, the loss inflicted upon the workman by accident in the course of manufacturing. It is asserted that this expense is an item in the cost of production, and should and will be added to the other items; thus enhancing the price demanded by the manufacturer of the consumer of the finished product.

But the question who is, or who ought to be, the ultimate paymaster (whether it should be the employer or the consumer) is not material here. We are assuming, for present purposes, that it is just that the workman should recover; and that the employer should be made primarily liable. Our inquiry is, whether there are other persons, outside the class of employees, whose claim to recover is equal to that of the employees. Our question is, who should be allowed to recover as plaintiffs, rather than whether the employer, if held as defendant, is practically certain of reimbursement at the hands of the consumer.

If the point were material here, doubts might be suggested as to whether expense incurred by the employer in paying workmen for accidents can always be passed on by him to the consumer, as an item in the cost of production. It is difficult to see how a payment by the master of a private household to a domestic servant (under the English Act of 1906) can be "passed on" to any other person. And in the case of payments by an employer to workmen for accidents in the course of manufacturing, the manufacturer may not always be able to obtain practical reimbursement from the consumer. As to luxuries, if the price asked is materially enhanced by such payments, the consumer may sometimes prefer to deny himself and to refrain from purchasing. As to necessities, he may sometimes choose to buy an inferior, but cheaper article (one of inferior grade). Between organized labor and organized capital, the unorganized consumer fares hard (see Prof. Mechem in 44 Am. Law Review, 244); but there may be limits to his endurance.

Furthermore: if the public adopt the view that the product of the industry ought to bear any part of the loss incurred by workmen through pure accident, the question will be raised, why should it not bear the whole loss; why not allow a damaged workman (not himself in fault) to recover full compensation? Even if there are satisfactory answers to this question, it may be doubtful how far such answers would prevail with legislatures.



transportation. Workmen are now frequently employed in large masses, so that the personal supervision of the employer is no longer possible. The danger of serious harm to the workman in some modern undertakings was at first much greater than under the old forms of industry; and it was more difficult to prove fault on the part of the employer. It has been estimated that in about one half of the accidents to workmen it is impossible to prove fault on the part of any one. The accidents are not unfrequently due to dangers inherent in the method of work; and the damaging results may be viewed as "inevitable" in the broad sense of the term.

The workmen of forty years ago did not usually claim that absolute liability, irrespective of fault, should be imposed on their employers. As a general rule, they asked only to be relieved from the operation of three special defenses, by means of which employers often succeeded in defeating suits brought by workmen. The defenses thus objected to were:

1. The doctrine known as "the fellow-servant rule," or as "the common employment rule."
2. The doctrine known as "the voluntary assumption of risk."
3. The rule of "contributory negligence."

As to the first doctrine, "the grievance complained of on the part of the workmen was that, whereas an employer was liable to strangers for injury caused to them by the acts or defaults of his servants in the course of their employment, he was not liable to one servant for injury caused by the act or default of another."<sup>18</sup> This doctrine applied only to actions by workmen; and by it the workman was placed in a worse position than an outsider. Furthermore, in applying it some courts gave a pretty broad construction to the terms "fellow-servant" and "common employment."<sup>19</sup>

The application of the doctrine of voluntary assumption of risk was not confined to actions by workmen against their employers; but it seems to have been applied in such actions more frequently and with more practical effect than in actions by other plaintiffs.

The rule of contributory negligence was applied to actions by

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<sup>18</sup> Pollock, *Essays in Jurisprudence*, 114.

<sup>19</sup> "It was the doctrine of 'common employment,' and the lengths to which the judges carried it, that first raised the discontent of the leaders of the trade unions." Birrell, *Lectures on the Law of Employers' Liability*, 33.

other persons as often and as effectively as it was to actions by workmen.

Suppose that the legislature, without enacting a Workmen's Compensation Act, had expressly abolished all three of the above defenses so far as suits by workmen are concerned. What would the effect have been? The abolition of the first defense would have put the workman upon an equal footing with an outsider. As to the second and third defenses he would have been put in a better position than an outsider. The abolition of the defense of contributory negligence, so far as workmen are concerned, would have had a far-reaching effect. Whether confining the abolition of this defense to suits by workmen only would not be an unjust discrimination in favor of that class, is an interesting question. We do not, however, pause to discuss it; because we think that the doctrine of contributory negligence, as applied to any or all plaintiffs (*i. e.*, to plaintiffs in general), is a decadent doctrine, which will ultimately disappear from the law.<sup>20</sup>

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<sup>20</sup> The term "contributory negligence" should properly be applied only to those cases where the negligent acts of plaintiff and defendant each constituted a part of the legal cause; and not applied where the negligent conduct of one party was merely an antecedent condition and the negligent conduct of the other party was the entire legal cause.

Under the common law rule in England, and in many of the United States, the plaintiff is barred if his negligence constitutes any part, however small, of the compound legal cause, although the defendant's negligence may have constituted a much larger part. This drastic rule is extremely unpopular; and, if adhered to, is likely to lead to the entire abolition of the doctrine that a plaintiff's contributory negligence bars his action. A very different rule prevails in the maritime courts of some nations. See 13 *Law Quarterly Review*, 17. In some countries, including the United States, and, until recently, England, in a case of collision between two ships, where the fault of each is part of the cause, the loss is equally divided. In some other countries, in such a case, the loss is divided proportionately to the respective faults of the two vessels; and this rule has now been virtually adopted by statute in England. "... the damage or loss shall be in proportion to the degree in which each vessel was in fault." English Act of Dec. 16, 1911; 1 & 2 Geo. 5, chap. 57, § 1. If the latter rule had been generally adopted in common-law courts, the doctrine of contributory negligence would have been much less unpopular. But common-law judges might often hesitate to allow juries to make a division of loss on this basis. In the maritime courts of this country, where there is no jury, the judge might be willing to trust himself to make the division.

Able counsel, in an argument before the United States Commission, contend that, where the sum recoverable under the Workmen's Compensation Act is only about half the actual damage, the statute, in effect, divides the loss in the case of the workman's contributory negligence. They say:

"Few now would venture to maintain the justice of regarding contributory negli-



All three of the above defenses are now practically abolished wherever the ordinary Workmen's Compensation Act is in force. The continued existence of these common-law defenses is incompatible with the rule of absolute liability imposed by the "compulsory" form of the Workmen's Compensation Act. A clause of express abolition would generally be superfluous.<sup>21</sup>

Forty years ago, depriving a culpable employer of these three defenses would probably have satisfied the demands of the great majority of workmen. But to-day they make the far more important request that an employer should be made absolutely liable to them, even though he is entirely free from blame. And the passage of a Workmen's Compensation Act is a virtual granting of this request, so far as relates to industries within its scope.

Some comments upon, or descriptions of, this kind of legislation, if such comments are viewed as disconnected statements, might seem to ignore the basic theory of the legislation and also the in-

gence as a complete defense. This doctrine the civil and admiralty laws always have rejected. But simply to abolish the rule of contributory negligence and to make the employer liable for full damages just as if there has been no contributory negligence would not correct its injustice; it would merely shift the injustice from the servant onto the master. The compensation law solves this problem simply and justly by treating the cause of the injury as it is, namely, a joint fault, and dividing the loss accordingly, the employer paying his share in 'compensation.'" 2 Report, United States Commission, 637.

But the learned counsel here assume that the cause of the injury is "a joint fault"; whereas the statute compels the employer to make partial compensation, even though he were in no fault whatever. And a workman may (under the English Act of 1897) recover against a faultless employer, even though the workman himself were negligent and his negligence contributed to cause the damage, unless his negligence amounted to "serious and wilful misconduct." This is very different from the case where the maritime law divides the loss between two parties *both of whom are in fault*.

<sup>21</sup> Under the ordinary Workmen's Compensation Act, fault on the employer's part "is no longer an element of the employee's right of action. This change necessarily and logically carries with it the abrogation of the 'fellow-servant' doctrine, the 'contributory-negligence' rule, and the law relating to the employee's assumption of risks." Werner, J., in *Ives v. South Buffalo R. Co.*, 1911, 201 N. Y. 271, p. 288.

Mr. Birrell, after speaking of the provision in the English Act of 1897 as to serious and wilful misconduct, says: "But for this exception, negligence" (*i. e.*, in cases falling within the limits of the act) "has disappeared, taking with her common employment, contributory negligence, and *volenti non fit injuria*." Birrell on Employers' Liability, 89.

The defense of contributory negligence, if not actually abolished, has been so vastly modified in most of the Workmen Compensation Acts, "that it is of very little practical value to the employer." 6 Maine Law Review, 286.

consistency between that theory and the fundamental principle of the modern common law of torts.

It is sometimes alleged that a Workman's Compensation Act does not make any change in the law of torts. Eminent jurists have said that "in strictness it stands outside the law of torts altogether"; that it "is a law of compulsory insurance, and quite beyond the region of actionable wrongs"; that it creates (or, in effect, *is*) "a statutory term of the contract of service"; and that the liability thus created is "quasi-contractual" rather than "delictual."<sup>22</sup> Again it is said: "It is not a regulation of any substantive duty, nor does it change the substantive law or the duty of the employer in any way. It is exclusively an economic readjustment of the burdens of industrial accident." It is "idle to try to borrow tort analogies, either for or against this legislation." This legislation is "not founded on tort, but is founded on the supposed economic shift of a burden from shoulders which are believed to be unable to bear it, to the employer, who is supposed to be better able to bear it and to be able to get back that cost from the public."<sup>23</sup> "Such 'compensation' is not 'damages' nor meant in principle to be half damages. Neither is it based upon the idea of tort, or meant to be a reparation for a wrong. In principle it is the payment of the employer's share of a common loss in a common undertaking. It has, therefore, none of the injustice of the fictions of our law by which an employer without real fault is often held liable in full damages just as though he had done a wrong."<sup>24</sup> It has also been contended that the statute is a legislative exercise of the taxing power, and not of the general police power; that it is not concerned with the adjustment of private duties or actionable wrongs, but is rather the imposition of an occupation tax upon employers in certain kinds of business; the sums levied constituting a fund for the relief of workmen who have been harmed in the conduct of the business.<sup>25</sup>

But, notwithstanding these modes of characterizing this kind of

<sup>22</sup> See Salmond on Torts, 1 ed., 99; Pollock, Torts, 6 ed., 105.

<sup>23</sup> Mr. Reath, vol. 2, Report of U. S. Commission 122, 127.

<sup>24</sup> Messrs. F. L. Stetson *et als*, 2 Report United States Commission, 438.

<sup>25</sup> See *Cunningham v. Northwestern, etc. Co.*, 1911, 44 Mont. 180, 209, 213; Mr. Alpheus H. Snow, in 59 Univ. Pa. Law Review, 287, 288, 291, 293-297; Mr. J. H. Boyd, in 10 Michigan Law Review, 438-439, and 1 Boyd on Workmen's Compensation, §§ 67, 70, 75, 83, 87, 88, 91.



legislation, two stubborn facts remain. First: the statute imposes upon an employer a duty of compensation, which did not exist under the modern common law of torts. Second: the theory underlying the statute, its basic principle, is in direct conflict with the fundamental doctrine of the modern common law of torts. The statute shows "a distinct revulsion from the conception that fault is essential to liability." It is "a distinct reversion to the earlier conceptions that he who causes harm, however innocently, is, as its author, bound to make it good."<sup>26</sup> This legislation "has taken a wholly new departure as regards the cases within it."<sup>27</sup> The magnitude of the change thus effected and its radical nature have been recognized by many jurists.

"The time-honored principles of the law of torts have been cast aside, a wider rule of responsibility has been framed, and no man can now say what will be the ultimate effects of the new doctrine."<sup>28</sup>

"The Workmen's Compensation Act (1897) marks the commencement of a new era in the history of our jurisprudence in relation to liability for personal injuries."<sup>29</sup>

"The Workmen's Compensation Act of 1897 was based upon, and introduced, a new and somewhat startling principle."<sup>30</sup>

". . . The Workmen's Compensation Act, 1897, introduced a new principle into English law."<sup>31</sup>

"In 1897, however, legislation took a completely new turn. The Workmen's Compensation Act of that year (60 & 61 Vict., ch. 37) introduced into the law the new principle that an employer must, subject to certain limitations, insure his workmen against the risks of their employment. . . . The law, lastly, secures for one class of the community an advantage, as regards insurance against accidents, which other classes can obtain only at their own expense. . . . The rights of workmen in regard to compensation for accidents have become a matter not of contract, but of status."<sup>32</sup>

". . . There suddenly arises from all sides an apparently just claim that a common-law system of rules, which has occupied more

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<sup>26</sup> See language of Professor Bohlen, not used in reference to this legislation. 57 *Univ. Pa. Law Rev.* 452.

<sup>27</sup> Pollock, *Torts*, 6 ed., 95.

<sup>28</sup> P. B. Mignault, 44 *Am. Law Rev.* 719, p. 735.

<sup>29</sup> Minton-Senhouse on *Accidents to Workmen*, 2 ed., 109.

<sup>30</sup> Ruegg, on *Employers' Liability and Workmen's Compensation*, 8 ed., 263.

<sup>31</sup> Beven on *Employers' Liability and Workmen's Compensation*, 4 ed., 345.

<sup>32</sup> Dicey, *Law and Public Opinion in England*, 281-283.

than three hundred years in building up, is ethically bad and economically unsound, should be thrown into the scrap-heap with other worn-out machinery, and there should be substituted a new system based on wholly different principles unknown to the common or any other law until about twenty-five years ago."<sup>33</sup>

"... the principle underlying the act imports into British law the novel doctrine that an employer of labor, apart from personal or constructive negligence, is a compulsory insurer, against accident, of the workmen employed by him. . . ." <sup>34</sup>

"It has been said of the act that it has introduced a novel principle; but I consider that a misleading euphemism. So far from introducing a principle it has constituted a most unscientific departure from all the principles which make up and should make up the law of contract and tort. . . . I believe the contradictoriness of the legal conception has in a considerable degree contributed to the groping about of the judiciary in its efforts at defining and circumscribing the practical scope of the measure."<sup>35</sup>

In external form, there are some wide differences among the various Workmen's Compensation Acts which have been proposed or enacted in the United States. But none of these differences in any way affect our contentions, that the ultimate result brought about by each and all of these Acts is, in a large number of cases, utterly incongruous with the results which would be reached under the modern common law of torts, and that these Acts are all alike based on a theory entirely inconsistent with the modern common law.

There are differences as to the mode of payment. Sometimes it may be provided, as in the English statutes of 1897 and 1906, that the statutory compensation shall be payable directly by the employer to the workman. Sometimes the employer may be required to make periodical payments to an insurance fund (to be administered by the state or by a company); and it is provided that a damaged workman shall be paid out of the fund so constituted. The present tendency of legislation is to adopt a system of

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<sup>33</sup> Frank S. Streeter, of the New Hampshire Bar; Proceedings of the Maine State Bar Association, A. D. 1910-1911, p. 33.

<sup>34</sup> Clerk v. Lindsell, Torts, 4 ed., 98.

<sup>35</sup> Julius Hirschfeld, 13 Journal of the Society of Comparative Legislation, 119, October, 1912.



insurance, instead of payment by the employer directly to the workman.<sup>36</sup>

Again, the statute may, in form, be "compulsory" or "elective." A so-called "compulsory" statute is one which, like the English Acts of 1897 and 1906, "will go into operation irrespective of the consent of the employers and employees covered by it."<sup>37</sup>

A so-called "elective" or "optional" statute is one which, by the terms, permits either employer or workman to accept or reject it; and which takes effect as to either party only in case of acceptance, actual or presumed.<sup>38</sup>

"Where elective laws have been adopted, generally provisions are inserted for the purpose of coercing an acceptance of the law \* \* \*"<sup>39</sup> For example, it may be provided that, if an employer does not accept the statute, then, if sued at common law, he shall not be allowed to set up the three usual common-law defenses, known as "the fellow-servant rule," "the voluntary assumption of risk," and "contributory negligence"; and, on the other hand, if the employer accepts the statute and the workman does not accept it, then a suit brought by the workman at common law shall be subject to the above defenses. It is obvious that the statute is thus "made elective in form only to escape a fancied constitutional difficulty," and not because the legislature doubts the wisdom or justice of the result which would be reached under a "compulsory" law.<sup>40</sup>

<sup>36</sup> As to Workmen's Compensation Acts enacted by various governments: "Many of these are on the basis of insurance, but in none is the right to compensation confined to cases where the injury was owing to the fault of the employer." 36 Reports American Bar Association, A. D. 1911, page 936.

<sup>37</sup> Vol. 1, Report of United States Employers' Liability and Workmen's Compensation Commission, p. 60.

The Arizona Act of June 8, 1912, chap. 14, §§ 2 and 4, is compulsory as to employers, but elective as to workmen. This distinction is in accord with the express requirement of the Constitution of Arizona, art. XVIII, § 8.

A compulsory act which purports to apply only to certain occupations, may contain a provision whereby employers and employees in other occupations may, by agreement, "accept and adopt the provisions of this act." See Arizona Act, § 15.

<sup>38</sup> For instances of statutes which are practically compulsory as to public employers, but elective as to private employers and their workmen, see Michigan Act of March 20, 1912, Part I, § 5, pars. 1 and 2; Wisconsin Act of May 3, 1911, chap. 50, §§ 2394-95, pars. 1 and 2. Report of Massachusetts Commission, A. D. 1912, pp. 84, 91.

<sup>39</sup> 1 Report United States Commission, 61.

<sup>40</sup> See 1 Report United States Commission, 61.

A great majority of the statutes now in force are "elective" in form. It is believed that the Acts of Arizona, Ohio, and Washington (and the New York Act of December, 1913) are the only existing state statutes which are compulsory as to private employers. And the Arizona act, while compulsory as to employers, is "elective" as to workmen. See Arizona Act of June 8, 1912, chap. 14, §§ 2, 4.<sup>41</sup>

The "elective" form of legislation has been severely criticized.<sup>42</sup> And it has been doubted whether constitutional objections, if otherwise tenable, can be removed by adopting this optional form of legislation.<sup>43</sup>

But such criticisms and objections do not affect our present discussion. The point to be made here is: that all these various forms of legislation (a direct payment by employer to workman, or payment through an insurance fund; a "compulsory" statute, or an "elective" statute) are all alike intended to bring about one and the same ultimate result; and are all alike based upon one and the same general theory. They are all intended to accomplish a result entirely incongruous with that which would be reached under the

<sup>41</sup> The Nevada Act of 1911 was a compulsory statute, and applied only to employers in alleged extra-hazardous occupations. The Nevada Act of 1913 is elective, and applies to employments in general. The Ohio Act of 1911 was elective. In 1912 Ohio adopted a constitutional amendment (see 34 Ohio State Bar Association, pp. 63, 64) which authorized the legislature to compel employers to contribute to a State Insurance Fund. The Ohio Act of 1913 compels such contribution. See Mr. Yapple's statement of the differences between the two acts; 34 Ohio Bar Association, 64-68. "In 1910 the state of New York passed two laws relating to compensation for injured employees. One of these," (chap. 352) "was elective and applied to all employers of labor. It is still in force in New York. . . . The other" (chap. 674) "was a compulsory law applying only to certain hazardous industries." In 1911, the latter act was held unconstitutional. 201 N. Y. 171. See Report of Massachusetts Commission on Compensation for Industrial Accidents, report, 77, 88.

In November, 1913, a constitutional amendment, printed in note 3 *ante*, was adopted in New York. The daily newspapers of Dec. 13, 1913, announced the passage of a Compulsory W. C. Act, by both branches of the New York Legislature, on Dec. 12, 1913.

<sup>42</sup> It has been styled "pseudo-elective." It has been asserted that "such a law is fundamentally unsound." 1 Report U. S. Commission, 61. "It is conceded to be a piece of legislative trickery." Prof. Freund, 6 Illinois Law Review, 443. It has been called "a plan elective on the face of it, but not elective in fact;" ". . . optional in name, but coercive in substance." Prof. Freund in 2 Report U. S. Commission, 52, 53.

<sup>43</sup> See Prof. Freund, in 6 Illinois Law Review, 441, and in 2 Report U. S. Commission, 267; 2 Amer. Labor Legislation Review, 51-55. But see Holmes, J., in *Assaria State Bank v. Dolley*, 1911, 219 U. S. 121, p. 127.



modern common law of torts. And they are all alike based upon a theory (that fault is not requisite to liability) which is utterly inconsistent with the fundamental principle of the modern common law of torts.<sup>44</sup>

Hence, in discussing the inconsistency between Workmen's Compensation Acts and the modern common law of torts, we shall hereafter make no distinction between the various forms of legislation above described. For our present purpose, one difference only among these statutes demands special attention; and that relates to the various kinds of occupation to which the different statutes apply. And it will be found that any difference in this respect does not depend upon whether the mode of payment is direct or indirect, or whether the statute is "compulsory" or "elective."

"Statutory law need not profess to be consistent with itself, or with the theory adopted by judicial decisions."<sup>45</sup> All statutes which are not merely declaratory are "amendments" of existing law, either existing common law or existing statutory law. The intention of the legislature is either to supplement or reverse existing law. In many cases the fact that the legislature has enacted a statute inconsistent with the common law affords no sufficient ground for asking a court (or a legislature) to reverse an established common-law doctrine as to cases not falling within the statute. But there may be strong reasons for such action by courts or legislatures in the following instances:

(1) Where a statute of large application proceeds on a theory in direct conflict with the common-law theory on a fundamental point; in other words, where the enactment of the statute can be justified only in the view that the common-law theory is indefensible in principle.

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<sup>44</sup> " . . . The elective system does recognize the fundamental principle upon which all workmen's compensation rests, of payment for accidents that occur without fault of the injured." Mr. H. H. Smith, 10 Michigan Law Review, 289.

"Legislation of this character must be justified upon the ground that to make the employer liable irrespective of fault is in accordance with sound public policy. In other words, the common-law system of liability for fault no longer subserves enlightened policy which, under modern industrial conditions, should regard the fact of injury and not the question of fault as being the test of the employee's right and the employer's liability. To provide, however, for an election between the old liability and the new is in reality to place two diverse principles at the foundation of the law."

1 Report United States Commission, 63.

<sup>45</sup> Holmes on the Common Law, 63.

(2) Where a statute covers a large class of cases, but does not apply to other large classes of cases which, both from the standpoint of principle and from the standpoint of expediency, rest on the same ground.

In (1) the enactment is strong evidence of prevailing public opinion that the common-law doctrine is unjust. In (2) if the common law is not further altered, a large class of persons will, under the statute, enjoy rights and privileges which are not enjoyable by other large classes of persons who, on principle, have an equal claim to such enjoyment.<sup>46</sup>

If the fundamental general principle of the modern common law of torts (that fault is requisite to liability) is intrinsically right or expedient, is there sufficient reason why the legislature should make the workmen's case an exception to this general principle? On the other hand, if this statutory rule as to workmen is intrinsically just or expedient, is there sufficient reason for confining the benefit to workmen alone; is there sufficient reason for refusing to make this statutory rule the test of the right of recovery on the part of persons other than workmen when they suffer hurt without the fault of either party?

Can the statutory discrimination in favor of workmen be supported by considerations of justice or expediency, which are applicable to workmen and not equally applicable to some other classes of persons?

Or, can the statute, although seemingly in conflict with the fundamental principle of the modern common law of torts, be defended as falling within certain well-recognized exceptions to that principle; exceptions which have been fully established at common law? Is the statutory rule a logical extension or application of one of these exceptional doctrines, or can it be deemed analogous to one of these exceptional doctrines (*i. e.*, will reasoning by analogy from one of these doctrines furnish support for the principle of the statute)?<sup>47</sup>

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<sup>46</sup> See Lord Hobhouse, in *Smart v. Smart*, L. R. (1892) Appeal Cases, 425, 434, 435, 436.

<sup>47</sup> The view that the basic principle of the Workmen's Compensation Act is merely a logical extension, or a liberal application, of established legal doctrines, does not seem to have occurred to some of the authors and lawyers, whose utterances are



As to considerations of justice and expediency urged in support of the statute.

It is argued that a part (at least) of the damage, happening to workmen in a business without fault on the part of any one, should be borne by the owner of the business, because the latter initiated the undertaking with a view to his own benefit, and because he will reap the net profit of the business if any should accrue. Indeed the assumption sometimes seems to be that the owner is to get all the benefits of the business, and that hence it would not be unjust to require him to bear all the risks encountered by the workmen and to make full compensation for the entire damage suffered by the workmen. The incorrectness of this assumption has been pointed out by Professor Mechem. The owner, or master, "in no proper sense gets all the benefits of the business." Ordinarily the master is not the only one who receives benefit. "Being employed may be just as great a benefit to the servant as the employment of him may be to his master." The employee generally takes none of the risks of the ultimate pecuniary success of the business. He usually "gets his pay, whether the business be successful or unsuccessful."<sup>48</sup> But waiving these objections, and assuming that the workman may justly claim that the owner should be liable to partly compensate him for harm due to pure accident (non-culpable conduct) in carrying on the business, why has not an outsider (a member of the outside public, not participating in carrying on the undertaking) a claim for compensation, at least equal in justice to that of the workman, when he (the outsider) is damaged by pure accident in carrying on the undertaking?<sup>49</sup>

The employee is himself a part of the undertaking. He has, in one sense, voluntarily participated in it; and is deriving benefit from it. Whereas outsiders have nothing to do with the under-

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quoted *ante*, pp. 246, 247. They regarded such legislation as introducing "a new principle;" as taking "a wholly new departure."

<sup>48</sup> See Prof. Mechem, 44 *Amer. Law Rev.*, 241-242, 227.

<sup>49</sup> Take the example, given earlier in this discussion, of the collision on the highway of a trolley car and a wagon; whereby, without fault on the part of any one, damage is sustained by three persons; viz., the motorman, the driver of the wagon, and a paying passenger in the car. The motorman, under the statute, recovers partial compensation from his employer, the owner of the trolley line. The wagon driver and the passenger would generally have no right of recovery. But why is not their claim equal in justice to that of the motorman?

taking. Frequently they "are exposed, without any choice on their side, to more or less risk of injury arising from what is done in the conduct of it by the owner or his servants." An outsider is not a participant in the business and "derives no direct benefit from its carrying on."<sup>50</sup>

Why single out workmen employed in the undertaking and constitute them a specially protected class, while overlooking other persons whose claim stands on at least equal ground?

Mr. Asquith has been quoted as laying down the following proposition:

"Where a person, on his own responsibility and for his own profit, sets in motion agencies which create risk for others, he ought to be civilly responsible for the consequences of what he does."<sup>51</sup>

"Civilly responsible" *to whom?* Responsible only to workmen who have participated in the activities (the undertaking thus set in motion): or responsible also to members of the outside public who have not participated in the undertaking nor derived any direct benefit from it, but who have been exposed to risk by the carrying on of the business? If responsible to any one, why not responsible to all persons as to whom the agencies set in motion "create risk"?<sup>52</sup>

If it is just to grant partial compensation to a workman in the undertaking and also to an outsider, why may not the claim of a paying customer of the business, who is damaged without fault on the part of any one (*e. g.*, a paying passenger in a trolley car) stand on at least equally strong ground? The fares paid by passengers to the common carrier in the trolley business constitute the fund out of which the motorman is compensated. The objection may, perhaps, be raised that the passenger, when entering into a contractual relation with the carrier, could have stipulated for com-

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<sup>50</sup> See Pollock's Essays in Jurisprudence, 131-132; Prof. Mechem, 44 Amer. Law Rev. 228, 227.

<sup>51</sup> This is understood to apply to a case where there is no negligence.

<sup>52</sup> As to the requirement . . . "and for his own profit."

If this is used as meaning "for his own pecuniary advantage," it may be asked, why is there not just as much reason for liability when the defendant's purpose is to promote his own health or pleasure?

Sometimes the purpose of obtaining pecuniary profit may tend to justify conduct which would otherwise make defendant liable. For example, acts done by defendant on his own land, occasioning some damage to neighboring land, may, in some cases, be justified if done for the purpose of making beneficial use of defendant's real estate.



pensation in case of pure accident. But it is matter of common knowledge, and fully recognized by the courts, that passengers do not stand upon an equality with common carriers as to arranging the terms of the contract of carriage.<sup>53</sup> The same argument — that the party could have stipulated for compensation — was formerly used to justify the doctrine that the workman who did not so stipulate assumed the inherent risk of the undertaking. The answer that finally prevailed against this argument was, that the workman did not stand upon an equality with the employer in settling the terms of the contract of employment. The same answer applies to the relation of the passenger with the common carrier.<sup>54</sup>

It has been asserted that the principle underlying the Workmen's Compensation Act is merely a logical extension of the doctrine as to a master's liability for the tort of his servant: a doctrine often spoken of as the rule of *respondeat superior*. By that rule, a master is liable to strangers for damage done to them by the tortious conduct of his servant while acting in the course of his employment; although the master was in no fault as to the selection of the servant, or as to the orders given to him. The master may sometimes be liable, not only for an act which he did not direct, but even for an act which he had positively forbidden.<sup>55</sup>

Mr. Birrell says: "*Respondeat superior* is a dogma which holds in its arms the new dogma of the new Bill." <sup>56</sup>

Professor Freund says: "The liability of the employer irrespective of his fault is finally analogous to the general principle of the liability of the master for the acts of his servant." <sup>57</sup>

Here are two distinct propositions. (1) That the owner of a business, who is personally free from blame, is liable for damage caused by the tort of his servant in the conduct of his business. (2) That an owner is liable for damage happening in the conduct

<sup>53</sup> See Prof. Bohlen, 20 HARV. L. REV. 23-24.

<sup>54</sup> In these days of Labor Unions and collective bargaining, the assumption that *the workman* does not stand on an equality with the employer may no longer be justified in all cases. But outsiders and paying passengers are not, as yet, "organized."

<sup>55</sup> See Pollock, Essays on Jurisprudence, 114, 115; Pollock, Torts, 6 ed., 75, 77; Salmond, Torts, 1 ed., 78, 83; Salmond, Jurisprudence, Ed. of 1902, 466-468; Burdick, Torts, 2 ed., 130-132.

<sup>56</sup> Birrell's Lectures on the Law of Employers' Liability, p. 77.

<sup>57</sup> 6 Illinois Law Rev. 435-436. 2 Am. Labor Legislation Review, 47.

of his business without fault on the part of any one; neither the fault of himself or of his servant or of any third person. The implication of Mr. Birrell and Professor Freund seems to be that it is only a short step from proposition 1 to proposition 2. But, instead of there being only a short step from one of these propositions to the other, we should say (borrowing language used by LORD HERSCHELL in another connection) that there is a chasm between them.

In the first case, there is fault; although the owner is not personally culpable. In the second case, there is no fault whatever. Because the law holds an owner responsible for harm due to faults committed by his servants in the conduct of his business, it does not follow that the law should also hold him responsible for harm happening without any fault at all on the part of any person whatever. In the first case an existing fault of his subordinate is, whether justly or unjustly, imputed to the owner. In the second case there is no fault of any one to be imputed to him.<sup>58</sup>

It is said by Professor Freund that the principle *respondeat superior* is "a principle of liability without fault." This is true to the extent that, by this principle, liability is imposed when there is no personal fault on the part of the "superior." But this is done only when there is fault on the part of the "inferior." It is not a principle of liability without fault on the part of any one. There may be "vicarious liability," for the torts of others, but not for the innocent (non-culpable) acts of others.

Again, Professor Freund seems to think that there is no valid distinction between the abrogation of the fellow-servant doctrine and the adoption of the rule of absolute liability maintained in the Workmen's Compensation Act. But the abolition of the fellow-servant rule makes the master liable to Servant No. 1 only when he has suffered by the fault of Servant No. 2. It does not have the effect of making the master liable for harm caused to Servant No. 1 by the non-culpable conduct of Servant No. 2. The abolition of the fellow-servant doctrine is not based on the theory that

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<sup>58</sup> "Could a husband or master be held liable under the common law when the wife or servant had been guilty of no wrong? Would the common law have denied to the husband or master the right to prove that no tort had been committed by the wife or servant?" Werner, J., in *Ives v. South Buffalo R. R.*, 1911, 201 N. Y. 271, p. 311.



a master ought to be liable to a servant for harm suffered by pure accident, without fault on the part of any one. Such abolition is not an extension of the rule *respondeat superior*, but is the removal (repudiation) of an illogical exception to that rule.<sup>59</sup>

In this connection Professor Freund quotes Senator Sutherland's terse statement: ". . . In the one case the master is held responsible for the fault of the dangerous agent, and in the other for the fault of the dangerous agency." The fallacy here consists in using the word "fault" as if it meant the same thing in both clauses, when in reality it is used in two different significations. "Fault of the dangerous agent" means personal fault on the part of the agent, conduct morally blameworthy. "Fault of the dangerous agency" can here mean nothing more than risk inherent to the business. A machine cannot be "in fault" in the same sense as a man.<sup>60</sup>

Moreover, the rule of *respondeat superior* can hardly furnish ground from which to reason by analogy. The rule, in its present strong terms, was not firmly established in the common law until comparatively modern times. Its intrinsic justice has been questioned in our own day by high authority. It is, in itself, an exception to the general modern doctrine of the common law — that there is no liability in tort in the absence of fault. The *respondeat superior* rule, though exceptional, is no doubt firmly established, and not likely to be overthrown. But it is admittedly a harsh doctrine; and it is doubtful whether the arguments in its favor would have prevailed, if servants in general had had the pecuniary

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<sup>59</sup> An eminent judge said, that the settled rule making a master, who was in no fault, liable to a stranger for the tort of his servant is intrinsically erroneous. But he also said that, if this rule is to be adhered to, then the rule that a master is not liable to one of his servants for harm done to him by the fault of a fellow-servant cannot be justified. It would be "a bad exception to a bad law." Testimony of Sir W. B. Brett, afterwards Lord Esher, before Select Committee of House of Commons, on Employers' Liability for Injuries to their Servants, Report of Committee printed in 1877, p. 115, interrogatory 1920, pp. 118-119, interrogatory 1931.

<sup>60</sup> It may be added that here the word "dangerous" is ambiguous. If "dangerous agency" means that the danger is so great that the use or business is extra-hazardous, then it might be held that the owner carries on the use or business at his peril. If, however, it means only that there is some risk of harm but not enough to make the use extra-hazardous, then the owner is not liable in the absence of fault on the part of himself or his servants.

ability of their employers.<sup>61</sup> It is not a doctrine to be extended by analogy.

Here reference may be made to a "halfway" doctrine of the maritime law in favor of seamen. It originated with maritime courts; but has been recognized by common-law courts.<sup>62</sup> So far as it goes, it ignores the theory of implied assumption of risk. If a seaman is taken sick or is hurt while in the service of the vessel, the ship is held for the expense of his care and cure, irrespective of fault on the part of those controlling the vessel. The ship is not, however, bound to compensate the sailor for his suffering nor for his "permanent loss of earning capacity." (This is a statement of the general outlines of the doctrine, without adverting to some points as to which there is a difference of opinion.)

Professor Freund relies on the "analogy" of this doctrine of the maritime law as to seamen in order to justify the principle of the Workmen's Compensation legislation, which practically reverses the rule of the common law as to employees in land industries. He says:

"We must remember that the law which ruled the most hazardous trade of earlier ages — that of the mariner — the common-maritime law, established the duty of relief after an accident, at least to some extent, and had the risk of industrial accident during the formative stages of the common law been as common and urgent on land as it was at sea, or as it is in many industries to-day, it is safe to say that the common law without legislation would have developed a similar liability. That the liability is now proposed to be extended beyond the period of actual sickness through the period of disability, or, in case of death, to the relief of dependents, constitutes a difference of degree and not of kind; the principle of liability is the same."<sup>63</sup>

Eighty years ago, the same argument from analogy was made before Judge Story; but for the purpose of bringing about an opposite result. The aim of counsel was not to induce courts (or legislatures) to reverse the common-law rule and adopt the maritime rule, but to

<sup>61</sup> See Pollock, *Essays in Jurisprudence*, 118; Salmond, *Jurisprudence*, ed. 1902, 468.

<sup>62</sup> See, for instance, *Scarff v. Metcalf*, 1887, 107 N. Y. 211; *Holt v. Cummings*, 1883, 102 Pa. St. 212.

<sup>63</sup> Prof. Freund, 2 *Report of United States Commission*, p. 263, and p. 260; also 6 *Illinois Law Review*, 435; 2 *Amer. Labor Legislation Review*, 46-47.



induce the maritime courts to reject the maritime rule and adopt the common-law rule. In a controversy as to the liability of a ship owner for the expense of curing a seaman, it would appear that counsel for the ship owner stated the common-law rule — that a workman employed in a factory on land, if hurt by pure accident, would have no remedy against his employer; — and that they then contended that the analogy of the common-law rule as to land workmen should be applied to seamen, and that thus the maritime law should be made to conform to the common law.

But Judge Story, in effect, denied that there was a strong analogy between the cases of workmen on land and seamen on vessels; or between common law and maritime law as to this and kindred subjects.<sup>64</sup>

Story, J., 1 Sumner, pp. 199, 200, said:

“It has been suggested, that a seaman at home cannot be entitled to any claim against the owners of the ship for injuries received in the ship’s service, any more than a mechanic or manufacturer at home for like injuries in the service of his employer. If the maritime law were the same in all respects with the common law, and if the rights and duties of seamen were measured in the same manner, as those of mechanics and manufacturers at home, doubtless the cases would furnish a strong analogy. But the truth is, that the maritime law furnishes entirely different doctrines upon this, as well as many other subjects, from the common law. Seamen are in some sort co-adventurers upon the voyage; and lose their wages upon casualties, which do not effect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules of discipline and sufferings from landmen. The policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privileges, duties, and liabilities in the sea service, which do not belong to home pursuits. The law of the ocean may be said in some sort to be a universal law, gathering up and binding together what is deemed most useful for the general intercourse, and navigation, and trade of all nations. Who ever heard of salvage being allowed for saving property on land? Who ever heard of any civilized nation, which denied it for salvage services at sea, or on the sea-coast? It is impossible, therefore, with any

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<sup>64</sup> The seaman’s feet were frozen while in the ship’s boat in the service of the ship, at the home port, before he was discharged from the ship on the return voyage. He was held entitled to recover from the owners of the ship compensation for the expense incurred in his cure. *Reed v. Canfield*, 1832, 1 Sumner (U. S.) 195.

degree of security, to reason from the doctrines of the mere municipal code in relation to purely home pursuits, to those more enlarged principles, which guide and control the administration of the maritime law."

There is another consideration in support of Judge Story's view. In the great majority of sailor cases of sickness or accident, the disease developed, or, the accident occurred, while the vessel was at sea, where no assistance was obtainable except from those in control of the vessel. The urgent necessity of the case is frequently so great that to deny the obligation on the part of the vessel is equivalent to denying any relief whatever. And so if the accident occurred during an outward voyage, it is a practical denial of relief, if, upon arriving at a foreign port, a sick or wounded sailor "can be turned adrift in strange lands without adequate provision." It is true that the maritime rule has been held to go far enough to make the ship liable for the expenses of cure where the accident took place while the ship was in the home port, and when its occurrence was not due to a peril of the sea.<sup>65</sup> But one cannot help supposing that the fact that a large majority of accidents take place during the voyage, and the peculiar and urgent necessity for obtaining immediate assistance in such cases, were among the most prominent considerations which induced maritime courts to establish the general rule.

*Jeremiah Smith.*

CAMBRIDGE, MASS.

[*To be concluded.*]

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<sup>65</sup> See *Holt v. Cummings*, 1883, 102 Pa. St. 212.



## SUGGESTIONS FROM LAW SCHOOL GRADUATES AS TO WHERE AND HOW TO BEGIN PRACTICE.

THE student about to graduate from law school is as a general rule very much at sea as to where and how he shall begin practice. He faces such questions as these: In what part of the country shall he settle? in a large city or in a small one? Shall he begin practice independently or with some firm? What may he expect to earn?

It was thought that it would aid or at least prove interesting to students trying to solve such questions if the experiences and suggestions of former graduates could be obtained. To this end a list of questions was sent out in 1912 by the Secretary of the Harvard Law School to all graduates of the preceding ten years. The more important of the questions asked were the following: 1. "What (as nearly as you can estimate it) have been your net earnings from law each year since graduation?" 2. "Have you any suggestions to offer to students about to graduate that might be helpful to them in deciding where to locate and under what conditions to begin practice?"

It was hoped that by tabulating the answers to the salary question in such a way as to show the earnings in various sections of the country some light might be thrown upon their relative advantages. The value of such a tabulation was not, however, as great as had been hoped owing to the small proportion of answers received. Out of the 1692 men questioned only 817, or about one half, answered the salary question. Of these 817 answers 123 could not be tabulated either because the men, instead of giving their earnings for each year, simply gave a lump sum for the whole period that they had been out, or because they merely described their earnings by some such adjective as "satisfactory," "sufficient," "little enough." Consequently the statistics are based upon only 694 answers or about 41 per cent of the men questioned. Under the circumstances one might naturally doubt whether the figures were fairly representative of the earnings of all the graduates. It might

for instance be supposed that perhaps the reason that the other 59 per cent did not answer was because their earnings were so small as to make them take the attitude of "the less said about them the better." If this supposition were correct the figures based upon the answers received would, instead of representing what the average graduate might expect to earn, merely represent what a few successful graduates have been earning and would give altogether too roseate a view of the situation. That the foregoing supposition is not correct seems, however, to be shown by the fact that many answers received were from men whose earnings were next to nothing and who could, to say the least, not be proud of making them known. Moreover the fact that it was known that all answers were to be regarded as confidential and that no names were to be disclosed would tend to make the unsuccessful men as ready to answer as the successful.

It is thought that the causes responsible for the fact that more men did not answer were: the disinclination of a busy man to answer a set of printed questions that he is not obliged to answer; the natural reluctance, even though there were assurances that replies would be regarded as confidential, to answer questions of so personal a nature; the fact that many of the men probably had not kept accurate enough accounts since graduation to have the material necessary for answering. That this last reason was a considerable factor is indicated by the fact that a much larger proportion of answers were received from graduates of recent standing than from those who had been out several years. That is to say, the recent graduates could remember what they had been earning, whereas the older graduates could not.

The following is a table of average earnings made up from the answers received.

	1st yr. out.	2d yr. out.	3d yr. out.	4th yr. out.	5th yr. out.
General . . . . .	\$664 (694)	\$1110 (609)	\$1645 (497)	\$2150 (411)	\$2668 (317)
New England . . . . .	524 (269)	908 (229)	1368 (176)	1807 (164)	2341 (106)
Outside New England . . . . .	753 (425)	1232 (380)	1797 (321)	2378 (247)	2832 (211)
East of Mississippi R. . . . .	664 (611)	1128 (535)	1671 (439)	2215 (361)	2723 (284)
West of Mississippi R. . . . .	808 (77)	1206 (68)	1842 (52)	2382 (43)	3170 (28)
Cities of over 100,000 . . . . .	643 (591)	1093 (522)	1645 (372)	2171 (360)	2743 (231)
Cities of less than 100,000 . . . . .	783 (103)	1210 (87)	1736 (68)	2001 (51)	2552 (35)
Boston . . . . .	495 (188)	922 (156)	1421 (123)	1865 (106)	2495 (78)
New York . . . . .	720 (142)	1243 (133)	1918 (98)	2261 (81)	3109 (55)
	727	1212	2120	2900	3300



	6th yr. out.	7th yr. out.	8th yr. out.	9th yr. out.	10th yr. out.
General . . . . .	\$3118 (249)	\$3909 (162)	\$4426 (112)	\$5321 (62)	\$5325 (40)
New England . . . . .	3062 (93)	3694 (59)	3902 (44)		
Outside New England . .	3216 (156)	4031 (103)	4765 (68)		
East of Mississippi R. .	3242 (217)	3982 (143)	4540 (101)		
West of Mississippi R. .	3445 (28)	4572 (16)	4010 (10)		
Cities of over 100,000 . .	3140 (218)	4025 (117)	4551 (98)		
Cities of less than 100,000	3290 (31)	3950 (22)	3550 (14)		
Boston . . . . .	3088 (67)	3897 (45)	4266 (33)		
New York . . . . .	3457 (45)	3834 (25)	4210 (21)		

The first line, headed "general," shows the average earnings each year after graduation of all the men answering the questions. The figures in parenthesis indicate the number of men on which the average is based. The figures seem to show that the average earnings range from \$664 for the first year to \$5000 for the tenth year, the earnings increasing pretty regularly at the rate of about \$500 a year. The succeeding lines indicate the earnings by sections of the country, by size of cities, and by particular cities.

On comparison of New England with all the field outside of New England, it is seen that the earnings in New England are less to begin with and less throughout. This would perhaps be expected since New England is more crowded with well-trained lawyers than almost any other part of the country and the competition is consequently keener there.

On comparison of the territory east of the Mississippi with that west of the Mississippi much the same result is reached, and doubtless for the same reason. The relative increase in the eighth year of the earnings of men east of the Mississippi over those of men west of the Mississippi cannot be relied on owing to the fact that the figures given for that year for men west of the Mississippi is based upon only ten answers.

On comparison of cities of over 100,000 population with those of less than 100,000, it appears that for the first three years the earnings are larger in the small city, but that after that the reverse is in the main true.

On comparison of Boston with New York, Boston seems to be distinctly behind for the first five or six years. After that there seems to be little difference.

Many more men answered the question calling for general suggestions as to location and conditions of practice than the

question as to earnings, and for this reason and because such answers have a more personal character than mere figures, they are perhaps of greater interest. As to the matter of location there are all kinds of suggestions as to the relative advantages of different sections of the country, of large and small cities and of particular cities.

There are many who advocate settling in the South or West, on the ground that as competition is less keen there a beginner will have a better chance to get started on less capital and less backing, and will make faster progress. Of the South one ardent supporter writes: "There is no section which affords better opportunities to an educated and well-fitted man than the South does. What we need here is leadership, and the country is willing to pay for it. We are in the midst of a great prosperity and the promise of the future is splendid. Our industrial growth in the next twenty years will undoubtedly exceed that of any other section of the United States. The South to-day is a commercial and democratic South and one need not hesitate to cast his lot here simply because he is not a Southerner by birth." That the opinion of the opportunities in the West and South is not uniformly favorable is shown by the following comment: "I travelled quite thoroughly over the West and South to see if they offered greater opportunities than the East, and came to the conclusion that the East is the better place, especially if the student has lived in the Eastern States and is acquainted there."

There is much discussion as to the advisability of settling in a large or in a small place. The argument in favor of the small place seems to be that a man can more easily make a living there from the start, and that if he possesses only fair ability, that ability will count for more. As one man states it: "If a man has had only mediocre success at the Law School and has maintained a stand of less than B and has no family or business connections which he may count upon to bring him a practice, I think he makes a mistake in entering practice in a big city. Such a man should in my opinion locate in some small city where he can make himself a power in the community, even without the legal ability which would bring him into the front rank of lawyers in New York, Philadelphia, Chicago, or Boston. He can accomplish much more with his life in a smaller place and do much more good to the community." An-



other man says: "Chances in a small or medium sized city are better than is generally supposed. Opportunities in the large cities are overrated. I have a classmate who felt obliged from motives of filial duty to settle in a town of about 8000. His friends were inclined to be sorry for him, but so far as I can ascertain he has done better than any of the rest of us." The argument in favor of the big city is put in these ways: "I should unhesitatingly say that those who have made the greatest success and who have gone the furthest are those who have started practice in large cities." — "In a small place there is danger of vegetating in commonplace comfort." — "Of the men I have known well in my class those in the large city have developed fastest in the way of legal ability *and* independence of thought and action."

Owing to the relatively large proportion of men who have located in Boston and New York, there are many comments on these places. As to Boston, the weight of comment seems to be rather unfavorable. One explanation of this may be that the number of well-educated lawyers there is relatively large. As one man puts it: "Boston is overcrowded with well-trained lawyers. A man should go to a place where his Harvard Law School education will be a greater asset to him." Another: "After practising for eight years in Boston I am constrained to say that many men make the mistake of undertaking practice there largely because it is easier to stay in the vicinity of Cambridge than to seek opportunities elsewhere. I doubt if I should advise any man to locate in Boston unless through friendships or otherwise he had some decided reason for preferring to begin there." But even Boston is not without its advocates, as is shown by the following mildly optimistic statement: "There is a conservatism among Boston people which makes it difficult for an unknown lawyer to secure clients. On the other hand this very conservatism is a protection to the Boston lawyer after he has secured his clients, because of the tendency of clients not to make sudden changes."—"A young man beginning in Boston cannot expect large returns without unusual ability or opportunity. On the other hand, it has been my experience that bench and bar are such that the law is a dignified and honorable profession. I think that a man may feel fairly confident that in time what talent he has will be appreciated."

As to New York, the opinion of many men seems to be that unless

a man has connections there, or unless he has unusual ability and health he had better keep away. This is expressed in various ways. One man says: "Don't go to New York unless possessed of unusual qualifications and willing to make any and every sacrifice for success." Another: "By no means practise in New York unless you are confident of a capacity to excel most of your fellows." The following is from a very successful graduate: "Success depends upon the hardest kind of work, upon tremendous vitality and constitution. Personally I should prefer less financial success in a smaller city with more chance to lead a healthier life." The advice of a member of a Harvard Law School Committee formed in New York for the purpose of helping Harvard graduates to positions is worth quoting: "I suggest that men do not come to New York unless they are of exceptional ability or have some definite plan for developing a practice here which has the approval of some one familiar with conditions."

But here, too, there are men who take a more optimistic view of the situation, as, for example, a successful graduate who writes "New York's the place — almost every man in my class is doing well, and I began with absolutely nothing three years ago." The thing that appeals to many about New York is the very bigness and hardness of it all. As one man puts it: "Outside of work, the life might not appeal to many who have been brought up in smaller communities. In fact, there is n't such a thing as 'living' here in the same way that it is found in other places. But if one likes his work and enjoys the few friends he has time to see occasionally and gets satisfaction from merely *being in touch with big things and big business*, he has no excuse for not being happy."

The most valuable suggestion as to location is that given by a surprisingly large number of men. It is to "locate where you want to live." This is expressed in various ways. As one man puts it: "Decide where in view of all the circumstances you want to have your life work: then go there and fight it out." Another vividly states it thus: "'T aint where a hog roots, but how he does it that counts. Go where there are many people and hustle." Another says: "One can fail anywhere and it will be equally unpleasant. On the other hand, if one succeeds it is worth while that it should be in a place where success can be enjoyed. Let everyone choose the place where success would mean the most to him. Wherever



that may be, he can rest assured that there is no lack of opportunity if he will play harder than the next man." Another: "Select the place where you want to live. A man who has done fair work at the Harvard Law School can make a living anywhere. The thing to determine then is what are you looking for in life, where can you be most happy and do the most good."

As to the question of "conditions of practice" or the arrangement under which one is to start practice, there is first of all the problem whether one shall start independently or become connected with some established firm. If a man has no capital, he has not much choice in the matter, as it would be next to impossible for him to begin independently, except possibly in some small place where he was well known. But even if he has a small amount of capital, by far the greater number of men would advise his beginning with some established firm. The advantages of such a course are obvious. A man just out of a law school knows little about actual practice and needs an apprenticeship whereby he may learn the ropes of practice and become familiar with procedure and with office management. As one man says, it is as necessary for him to receive office training as it is for a medical student to go into a hospital.

Assuming that one decides to enter an office, the question is what kind of an office. The most important thing to consider is the character of the heads of the firm. No pains should be spared in ascertaining this. As to whether a large or a small firm is the more desirable there is much discussion. The advantages of the large office seem to be that as a rule one there comes in contact with big things and sees legal work handled in the most efficient manner. He is also apt to acquire a certain amount of prestige by being connected with a large well-known firm which will be of use to him when he practices for himself. The danger in a large office is that the work may be so highly specialized that the beginner will be put at one narrow kind of work only and may not get the general experience and training that he needs. In a small office there is the advantage of coming in closer contact with the heads of the firm and of having a responsible part in a great variety of work. The ideal combination seems to be a large firm which gives its assistants responsibility and variety of work.

Ordinarily a man should not go into an office with the idea of

remaining there permanently. He would not of course want to remain there permanently unless he were to be taken into the firm, and the chances of a man being made a member as a general rule are "chances" much too speculative to be counted upon. To be made a member of a firm a man must either be able to bring a great deal of business or must by his services make himself indispensable. The question for the average man then, is simply how soon he had better end his apprenticeship and begin practice independently, in partnership with men of his own time, or in some firm where there is a more immediate prospect of becoming a member. The great weight of opinion is that he should not remain as an assistant a minute longer than is necessary to acquire the experience in practice and procedure that he is after. As one man forcibly puts it: "Get the discipline and office experience under a successful firm. Then strike out for yourself as soon as the good Lord will let you." Just when the necessary experience will be acquired depends of course to a great extent upon the kind of office that a man has been in and the kind of training that he has been receiving. Ordinarily two years is given as the maximum. It is urged that if he remains longer than that he is not only wasting his time, but is "in danger of losing his independence of thought and action." As one man says: "Too long a time spent as an assistant tends to remove the sense of individual effort and of responsibility. The sense of standing on one's own feet is stimulating."

In conclusion it might be well to remind the reader, obvious though it must seem, that each individual has got to work out the problem for himself in the light of the conditions and circumstances surrounding his particular case. Let him remember that far more important than any question of location or method of practice are the personal qualities that he brings into the fight. Let him be scrupulously honest and upright, prompt in doing the particular piece of work, satisfied to give only the best that is in him to each job that he undertakes, and determined to succeed, and it will be an unusual combination of circumstances that can down him.

*Richard Ames.*

SECRETARY OF HARVARD LAW SCHOOL.



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JURISDICTION OVER VESSELS. — While a vessel is docked in the home port, the littoral sovereign has territorial jurisdiction. When the ship sails, all territorial jurisdiction ceases, since the high seas are the territory of no one. The position of the floating community is anomalous. Admiralty conceives of a vessel as an entity, like a person.<sup>1</sup> The sovereign of the flag gives protection at all times to this entity, just as it would to any subject. In return, the ship, like the subject, may be thought of as owing a duty of allegiance, and may be punished for a breach of this duty, though it occurs in some other territorial jurisdiction. Whoever joins the ship, thereby subjects himself to this continuing personal jurisdiction.<sup>2</sup> The sovereign of the flag may therefore issue prohibitions to all on board wherever the boat may be.<sup>3</sup> From this it follows that a single act may be an offense against three sovereigns.<sup>4</sup> It may simultaneously violate a prohibition of the sovereign to whom the individual is a subject, a prohibition of the sovereign of the flag, and be a breach of the peace where the vessel is.

Though a sovereign may forbid acts of individuals in other jurisdictions, he cannot continue to invest the individual with affirmative rights while under the control of another sovereign's law. The law of the

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<sup>1</sup> HENRY, ADMIRALTY, § 75.

<sup>2</sup> See *Regina v. Anderson*, 11 Cox C. C. 198, 204.

<sup>3</sup> See *Roberts v. Skolfield*, 3 Ware 184.

<sup>4</sup> See *Regina v. Anderson*, *supra*.

home port, however, continues to govern civil rights and corresponding duties on board ship when the vessel is on the high seas.<sup>5</sup> In the absence of any territorial jurisdiction, the community may be treated as governed by the law they took with them, like emigrants colonizing a desert island. But since territorial jurisdiction is paramount, as soon as the vessel enters a foreign sovereignty, the new law governs.<sup>6</sup> When the ship resumes the high seas, the home law revives, since the territorial jurisdiction, which kept it temporarily in abeyance, has terminated.

This result is sometimes reached by calling the jurisdiction on the high seas territorial and likening the ship to a floating piece of the home country.<sup>7</sup> But the statement is misleading. If the jurisdiction were territorial, it must be superseded by the territorial jurisdiction of a foreign port in which the vessel docks. Strictly, then, this newly acquired territorial jurisdiction would continue after the vessel leaves the foreign port, since no other has intervened — a result which is contrary to fact. That this doctrine of territorial jurisdiction in mid-ocean is merely a loosely stated rule of convenience is suggested by the holding that, although a statute defined the territory of New York State as land within certain boundaries, nevertheless New York law applied to a vessel on the high seas.<sup>8</sup>

Just when a vessel enters the territorial jurisdiction of a littoral sovereign is not clear. Nations are entitled by international law to impose certain protective regulations within three miles of the coast line.<sup>9</sup> But this jurisdiction is of a limited sort. International law gives every vessel a right to proceed peacefully within the three-mile belt.<sup>10</sup> The territorial jurisdiction has therefore not yet attached to a vessel in the lawful exercise of this right of way, since the littoral sovereign is powerless to forbid its passage. The conception of territorial jurisdiction must involve the right to exclude. As soon as the vessel does any act requiring the consent of the littoral sovereign, it would seem that the new territorial jurisdiction has superseded the law of the flag.<sup>11</sup> The vessel is no longer there of right.

Maritime treaties usually do not affect the preëxisting international privilege of peaceful passage.<sup>12</sup> American vessels have a general right to sail over the Great Lakes. Consequently, when Canada and the United States apportioned the waters between themselves by treaty, the mere presence of a ship of one nation in the peaceful exercise of its right of way within the waters assigned by treaty to the other does not necessarily operate to give territorial jurisdiction. Thus where death resulted from wrongful act on a Michigan ship within the waters of the Great Lakes assigned to Canada by treaty, it was held that the Michigan

<sup>5</sup> The *E. B. Ward, Jr.*, 17 Fed. 456.

<sup>6</sup> *Geoghegan v. The Atlas Steamship Co.*, 3 N. Y. Misc. 224, 22 N. Y. Supp. 749.

<sup>7</sup> See *Wilson v. McNamee*, 102 U. S. 572, 574.

<sup>8</sup> *McDonald v. Mallory*, 77 N. Y. 546.

<sup>9</sup> MANNING, *LAW OF NATIONS*, new ed., 119; WHEATON, *INTERNATIONAL LAW*, 8 ed., § 177.

<sup>10</sup> See HENRY, *ADMIRALTY*, § 12; *The Saxonia*, Lush. 410; *Mahler v. The Norwich & N. Y. T. Co.*, 45 Barb. 226.

<sup>11</sup> *Smith v. Condry*, 1 How. 28; *The Annapolis*, Lush. 295.

<sup>12</sup> See *The Grace*, 4 Can. Ex. 283.



law governed the rights of the plaintiff. *Thompson T. & W. Ass'n v. McGregor*, 207 Fed. 209 (C. C. A. Sixth Circ.). The result is consistent with the reasoning suggested.

#### THE SEGREGATION OF THE NEGRO IN SEPARATE RESIDENCE DISTRICTS.

— Any attempt to segregate the members of one race from those of another must necessarily carry with it a considerable restraint upon personal liberty. Such a deprivation of liberty is not unconstitutional if fairly within the exercise of the police power.<sup>1</sup> The very conception of police regulations involves a limiting of personal liberty. Accordingly it has been considered proper to require railroads to separate white and negro passengers, provided equal accommodations are supplied for both.<sup>2</sup> The friction resulting from race prejudice where the two races are thrown into close contact fairly justifies such provisions. Since intermarriage is beneficial to neither race, statutes prohibiting such marriages are upheld as tending to advance the health and welfare of the community.<sup>3</sup> Similar considerations of health and order have led to the upholding of statutes providing that white children should attend separate public schools from colored children.<sup>4</sup> In such a case it may be urged that, where a negro is compelled to receive his education and to form all his early associations with other negroes, there is added to mere restraint of liberty an unjust discrimination expressly prohibited by the Fourteenth Amendment; that while the whites lose nothing, even the better type of negro is excluded from his chance to better himself by early association with the higher civilization and culture of the whites. Such arguments, however, have not prevailed.

These considerations are more strongly felt when segregation is carried to greater extremes. In a recent decision the Maryland Court of Appeals was of the opinion that an ordinance does not deprive the negro of the equal protection of the laws which provides that in Baltimore no whites or negroes should thereafter reside in blocks exclusively occupied for residences by the other race. *State v. Gurry*, 88 Atl. 546. No discrimination appears on the face of the ordinance, and the Maryland court upheld it on that ground.<sup>5</sup> Where, in the case of segregation in railway cars, there is but a temporary separation, and in the case of the school segregation a separation only during childhood, by the Baltimore ordinance a negro is forever prohibited from residing among the whites and in the better residence districts of the city.<sup>6</sup> It has been asserted, and prob-

<sup>1</sup> *Jacobson v. Massachusetts*, 197 U. S. 11. See *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 567, 568.

<sup>2</sup> *Plessy v. Ferguson*, 163 U. S. 537.

<sup>3</sup> *State v. Gibson*, 36 Ind. 389.

<sup>4</sup> *Roberts v. City of Boston*, 5 Cush. (Mass.) 198. *Lehew v. Brummell*, 103 Mo. 546. This is probably also true of private schools. *Berea College v. Kentucky*, 211 U. S. 45.

<sup>5</sup> The court concluded that the Baltimore ordinance worked such a deprivation of property rights that it was not reasonable to suppose that the legislature meant to confer upon the city power to pass such an ordinance, and therefore held it invalid on that ground. The expression of opinion as to the validity under the Fourteenth Amendment is therefore a *dictum*, but an important one.

<sup>6</sup> *Slaughter-House Cases*, 16 Wall. (U. S.) 36; *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512; *Minneapolis & St. Louis Ry. Co. v. Emmons*, 149 U. S. 364.

ably with truth, that almost all the better portions of the residence section are occupied exclusively by whites. The negro therefore, however cultivated or successful, must always remain in an inferior social and physical environment. The difference in degree of discrimination from the railway car and school cases is such as to amount practically to a difference in kind. It is true that, under the Fourteenth Amendment, discrimination may be justified on reasonable exercise of the police power,<sup>7</sup> but it is clear that any discrimination on the ground of race alone is arbitrary and unconstitutional. Laundry regulations aimed at the Chinese alone are clearly in conflict with the Amendment.<sup>8</sup> Similarly it would seem that those statutes which discriminate, as regards the suffrage, in favor of the lineal descendants of those who voted in 1866 is in substance a discrimination against the negro, just because of his race and hence unconstitutional.<sup>9</sup> It may be argued that such discrimination as results from the Baltimore ordinance can be justified as an exercise of the police power. This cannot be based on the theory that the negro being more unsanitary affects the health of the white sections. It cannot be contended that because a man is a negro he is therefore unsanitary. Nor can the preserving of realty values in the "white" sections be within the exercise of the police power. The danger of racial intermingling is probably not rendered appreciably greater by residence in the same block. Hence the only plausible ground for justifying the ordinance is the danger of race friction. It is fair to assume that both races are equally at fault in the trouble which arises from race prejudice. It is questionable then, in view of the intent of the Fourteenth Amendment, whether it is possible to consider reasonable a regulation by which a negro, no matter what his individual characteristics, is confined because of his color to an environment rendered inferior to that open to a white man, by reason of the general standards of the negro race and their present status in the community.

Granting that the preserving of order could possibly justify such segregation, and admitting that a feasible method of segregating in an established community without discrimination is impossible,<sup>10</sup> it seems doubtful whether such necessity exists in Baltimore as to fairly bring such regulations within the police power.

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**TERRITORIAL APPLICATION OF WORKMEN'S COMPENSATION ACTS.** — The popularity of the economic principles involved<sup>1</sup> has caused many states to adopt Workmen's Compensation Acts, and makes further enactments probable. It becomes important to inquire whether

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<sup>7</sup> *Yick Wo v. Hopkins*, 118 U. S. 356. Where regulations are proper because of the nature of the occupation, they are none the less proper because the Chinese are alone affected. *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703.

<sup>8</sup> See 26 HARV. L. REV. 49-53 for a discussion of such statutes as affected by the Fourteenth Amendment.

<sup>9</sup> Were a new city to be plotted, regulations which set apart equally advantageous separate parts of the city for the whites and for the negroes would be less objectionable.

<sup>1</sup> 25 HARV. L. REV. 129, 328.



those already enacted can apply to injuries received outside of the enacting state, and, if so, whether such extraterritorial application is desirable. Some acts merely change the common-law tort liability of the employer by taking away defenses such as contributory negligence and assumption of risk, or by substituting a scale of damages for the common-law jury verdict.<sup>2</sup> Acts containing only these features can have no extraterritorial effect, since it is well settled that tort rights are determined by the law of the place where the injury occurs.<sup>3</sup>

But many statutes include provisions giving injured employees rights against some separate fund.<sup>4</sup> The employee's right may be that of a beneficiary of an actual contract between the employer and an insurance company.<sup>5</sup> Or it may be a right to payments from a fund created by the state and supported by compulsory contributions<sup>6</sup> from the employer or from both employer and employee. The duty of the state or insurance company to pay is not based on any causal or guilty relation to the accident, and so is dissimilar to rights *ex delicto*. Where premiums are compulsory there is no actual contract, but the money has been paid to the use of the injured employee, and it may be said to give him a right analogous to one in quasi-contract, or a right of a joint *cestui* in place of the right *ex delicto*. The extraterritorial effect of such a right would seem to depend upon the intention of the statute.

Although the power of the legislature to give extraterritorial effect to the act was assumed, a recent Massachusetts case construed the act of that state as not contemplating such effect. The court felt that any act having extraterritorial effect would be inadvisable, because of the difficult questions of conflict of laws to which it would give rise. *In re American Mutual Liability Ins. Co.*, 102 N. E. 693 (Mass.). Extraterritorial effect would seem to be desirable in certain cases. Thus, if the duties of the employee in an employment within the enacting state only occasionally take him over the state line, it would be best to give him there the same protection he would enjoy within the state, since, even if the other state so desired, it could hardly insure such temporary and

<sup>2</sup> BOYD, WORKMEN'S COMPENSATION, p. 11.

<sup>3</sup> C. & E. I. R. Co. v. Rouse, 178 Ill. 132, 52 N. E. 951; Walsh v. N. Y. & N. E. R. Co., 160 Mass. 571, 36 N. E. 584. 2 WHARTON, CONFLICT OF LAWS, 3 ed., p. 1098. But see p. 1104, note 9. Even though one of the parties has an option at the inception of the employment to substitute a fixed scale of damages for the common-law jury verdict, there would be no extraterritorial effect. But if the parties actually contracted for a certain mode of compensation, that would bar any action *ex delicto*.

<sup>4</sup> WASHINGTON LAWS, 1911, p. 345. The various acts are classified in 1 BOYD, WORKMEN'S COMPENSATION, p. 11. The insurance acts give rights to the employee, and must be distinguished from the insurance of employer's liability. The MASS. ACT, 1911, chap. 751, is classified in BOYD, WORKMEN'S COMPENSATION, p. 13, as giving the employee direct rights against the insurance fund and discharging the employer on payment of premiums. But it is not clear from the act that this is so.

<sup>5</sup> See *In re American Mutuality Liability Ins. Co.*, 102 N. E. 693, 694. The court says, "He is the beneficiary under a contract between the employer and insurer." If "beneficiary" here means what it does in the Washington act, the employee himself has a right against the fund. See WASHINGTON LAWS, 1911, p. 348. If, however, the employee's right against the fund is only derivative from his right against the employer, it is not an insurance feature resulting in a right to insurance in the employee.

<sup>6</sup> A statute compelling employers to insure all employees was declared constitutional in *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101. See also 25 HARV. L. REV. 129.

occasional work in a manner fair to all parties. So also would such effect be desirable where a foreign state has no compensation act.

The objection might be made to such extraterritorial effect that if an employment is regularly in two states which have compulsory insurance plans, both might compel insurance for the whole employment, and the employer would be charged double premiums. Such an objection would, however, be equally applicable where acts were merely territorial in effect, because in most statutes premiums are based, not on time of work, but on the type of employment and amount of wages.<sup>7</sup> Extraterritorial effect might conceivably result in recovery of insurance in both states on the analogy of accident insurance law. But this is not objectionable as unduly enriching the employee, since the pecuniary damage is so conjectural that it is perhaps impossible to ever say that the insured is fully indemnified by the recovery of money.<sup>8</sup>

It would seem that there would not be the objection that extraterritorial effect would allow a recovery of insurance in one state and *ex delicto* in another, because the recovery of insurance, even under a compulsory act, would seem to impliedly involve the release of the right *ex delicto*. If, however, an employee under a compulsory act should choose not to enforce his insurance right, he would certainly be free to exercise his right *ex delicto* in another state.<sup>9</sup> The employer would thus be a loser to the amount of the premium which was to cover that particular extraterritorial risk. This difficulty would not arise under acts the application of which is optional and which involve an express relinquishment of other rights.<sup>10</sup>

Another difficulty is that compelling the employer to pay premiums for accidents happening in states having no compensation act is depriving him of defenses to which he is entitled. This is justifiable, however, on the economic theory of the Workmen's Compensation Acts, which is that the burden of accidents is being put on the consumer by means of the employer's absolute liability.<sup>11</sup> There may be other difficulties due to the provisions of different acts. And since the cases where extraterritorial effect is desirable will cease to arise as the adoption of such acts becomes universal, it is perhaps wiser to confine their application to territorial accidents.

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VALIDITY OF CONTRACT INVOLVING BREACH OF PRIOR CONTRACT. — It is generally recognized that intentionally to induce a breach of con-

<sup>7</sup> An equitable result could be reached in either case by each state charging in proportion to the risk within its borders. This is analogous to the plan of taxation in *Pullman Co. v. Penn.*, 141 U. S. 18.

<sup>8</sup> See 26 HARV. L. REV. 377. Cf. *Etna Life Ins. Co. v. Parker*, 96 Tex. 287, 72 S. W. 168. Cf. *contra*, 2 MAY, INSURANCE, 4 ed., p. 1051.

<sup>9</sup> *Schweitzer v. Hamburg American Freight Co.*, 78 Misc. Rep. 448, 138 N. Y. Supp. 944, is not *contra*. It relies on the doctrine that the relation of master and servant having its inception in a contract is governed by the law where it was made. This is anomalous. See 2 WHARTON, CONFLICT OF LAWS, 3 ed., pp. 1008, 1103. It is indulging in fictions unless the employee has actually contracted away his rights *ex delicto*.

<sup>10</sup> 2 WHARTON, CONFLICT OF LAWS, 3 ed., p. 1105. Since an insurance right is substituted, such a defense would scarcely be against public policy. See 26 HARV. L. REV. 459. An example of such an act is MASS. ACTS, 1911, chap. 751, Part I, § 5.

<sup>11</sup> 25 HARV. L. REV. 131.



tract is a tort.<sup>1</sup> But judicial decisions have thrown little light on the supplemental question whether a contract is legal and enforceable, which involves the breach of a prior contract already binding on one of the parties.

Where the contract expressly demands as its consideration the breach of a prior contract, it is clearly illegal, on the principle that the actual consideration is a civil injury to a third person.<sup>2</sup> If the consideration stipulated for, however, is not an injury in itself, but merely involves some collateral wrong, such a contract cannot be unenforceable strictly because of the consideration. If unenforceable, it must be so because of public policy.

Under this type of contract where the consideration itself is not illegal, several situations arise. If the breach of the prior contract occurs before the making of the second one, there is no illegality involved in the new contract itself, for it could not possibly have been the cause of the prior breach. The wrong to the third person is separable from the contract, which thus remains enforceable by either party; for it is no defense to an action on a contract that the plaintiff has committed an independent tort. This would seem generally true; but an exception exists even here. Where the breach occurs prior to the second contract, but is committed on the agreement that a contract will follow, it would seem clear that the agreement at the breach is illegal, and that the illegality would taint a contract which was the direct product of the agreement.<sup>3</sup>

Where the two contracts are concurrent, and the performance called for by the second contract is not inconsistent with the performance of the first, the second contract is valid, even though there was also an inducement to a breach of the first contract. The contract itself did not cause, or tend proximately to cause, the damage to the third person. The injury was *dehors* the contract, and the fact that the two parties committed an injury independent of the performance of the contract does not invalidate it.<sup>4</sup>

In the two preceding types of cases, the breach of the first contract occurred prior to the contract in question, or was independent of it; the result is that the contract may be enforced by either party. A third situation may arise where the performance of the second contract necessarily makes impossible the carrying out of the first, and is made with knowledge of the harm that it must cause. A recent case holds that where A., with knowledge of the consequences, induced B. to enter into a contract the performance of which would necessarily involve the breach of one already existing between B. and C., A. may not recover for non-performance. *Wanderers Hockey Club v. Johnson*, 25 West. L. R. 434 (Brit.

<sup>1</sup> *Lumley v. Gye*, 2 E. & B. 216; *Angle v. Chicago, St. P., M. & O. Ry. Co.*, 151 U. S. 1. The existence of this liability is denied in several jurisdictions, however. *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492; *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57; *Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co.*, 138 Mo. 439, 40 S. W. 93. The liability is limited to cases of misrepresentation or coercion in New York and Indiana. *Ashley v. Dixon*, 48 N. Y. 430; *Jackson v. Morgan*, 94 N. E. 1021 (Ind.).

<sup>2</sup> A common instance is a contract to publish a libel. *Shackell v. Rosier*, 2 Bing. N. C. 634. See 21 HARV. L. REV. 290.

<sup>3</sup> *Cf. Fisher v. Bridges*, 3 E. & B. 642.

<sup>4</sup> *Cf. Armstrong v. Toler*, 11 Wheaton, 258.

Col.). The result seems clearly correct. By means of the contract, A. attempts to commit a tort on C. It is well settled that a contract which will interfere with fiduciary relations is unenforceable, as tending to cause a tort on third persons.<sup>5</sup> So also a contract in fraud of creditors.<sup>6</sup> The same public policy should make invalid a contract which, to the knowledge of the parties, necessitates the breach of a prior contract.<sup>7</sup> The fact that there is knowledge of the prior contract is an important element, where the performances of the two contracts are mutually exclusive. If the party in the second contract were ignorant of the existence of the first, he should recover for breach of the second contract. It is a general rule that where the immediate consideration is not unlawful, and the illegality consists alone in an intention of one of the parties, unknown to the other, the innocent party is entitled to damages for a breach of the contract.<sup>8</sup>

**TAXATION OF FOREIGN CORPORATIONS.** — Although the taxation of corporations outside of the jurisdiction in which they are incorporated presents many difficult problems, there are certain rules which seem definitely established. Property within the jurisdiction may be taxed even though the corporation owning it be engaged in interstate commerce.<sup>1</sup> Though a state may not tax the right of a foreign corporation to do interstate business in its jurisdiction,<sup>2</sup> it may require as large a tax as it chooses as payment for the permission to come into the state and there carry on a local business. This follows because a state may exclude such corporations entirely, since not being citizens under Article IV, § 2, of the Constitution, they may not claim rights and privileges equal to those enjoyed by domestic corporations.<sup>3</sup> Since the tax is the price of the privilege of doing business, the basis upon which the amount is estimated makes no difference. Thus it is valid when estimated upon the entire capital stock of the corporation.<sup>4</sup> The same result would follow where a corporation engaged in interstate commerce sought the privilege of doing a local business separate from that of an interstate nature.<sup>5</sup>

A more difficult question is presented when the corporation has been admitted into the state, has established a business and acquired property.

<sup>5</sup> *Guernsey v. Cook*, 120 Mass. 501; *Noel v. Drake*, 28 Kans. 265.

<sup>6</sup> *Leicester v. Rose*, 4 East 372.

<sup>7</sup> This would seem to be true, even though the second contract was not the sole cause of the breach of the first contract. Thus, B. makes an offer to contract with A., saying that at all events he will break his prior contract with C.; whereupon A. enters into the contract. The contract, it is submitted, is unenforceable, because it tended to cause a breach of the first contract. If a breach occurred, this second contract would be a proximate cause.

<sup>8</sup> *Pixley v. Boynton*, 79 Ill. 351. See WALD'S *POLLOCK ON CONTRACTS*, p. 485.

<sup>1</sup> *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, and cases therein cited.

<sup>2</sup> *International Text Book Co. v. Pigg*, 217 U. S. 91.

<sup>3</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168.

<sup>4</sup> *Pembina Mining Co. v. Pa.*, 125 U. S. 181; *Horn Silver Mining Co. v. New York*, 143 U. S. 395.

<sup>5</sup> The converse of this situation, where the local business was inseparable, was presented in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, and the tax held an unconstitutional regulation of interstate commerce.



An early *dictum* of the Supreme Court declared that since a corporation is a mere creature of the law of the creating state, it can have no existence beyond the operation of that law.<sup>6</sup> But however that may be, recent cases recognize such a foreign corporation as a person doing business within the jurisdiction, and entitled to protection under the Fourteenth Amendment.<sup>7</sup>

What are the limitations of the taxing power of a state over such a corporation? If it has been admitted to do business upon payment of a single fee or annual sum, it would seem that anything further exacted as a price for such privilege would be unconstitutional under the contract clause.<sup>8</sup> Any tax other than a fee paid for admission into the state must be based on the general privilege of doing business, or on property, and when discriminatory should be invalid under the Fourteenth Amendment. In a case arising under an Alabama statute imposing on foreign corporations a franchise tax in addition to the privilege tax required of all business concerns, the state's legislation was declared to be unconstitutional because discriminatory.<sup>9</sup> But in the recent case of *Baltic Mining Co. v. Massachusetts*, 34 Sup. Ct. 15, the Supreme Court upheld a Massachusetts statute which imposed an excise tax solely upon foreign corporations. The court distinguishes the former case on the ground that there the plaintiff, a railroad company, had acquired a large amount of permanent property within the state, while in the principal case the corporation, having no permanent property, might be treated as one seeking admission. It is submitted that this distinction is not sound. One of the plaintiffs in the principal case was a trading corporation which had been doing business in the state for ten years. Its good will, being liable to taxation as property,<sup>10</sup> is as surely entitled to protection under the Fourteenth Amendment as a railroad depot or round-house.

For some purposes foreign and domestic corporations may be classed differently. For instance, since a state has not so much control over foreign corporations incurring debts in its jurisdictions, it may reasonably lay stricter precautionary regulations upon them. But such classification has nothing to do with taxation, and the making of such a distinction for this purpose has been declared fanciful.<sup>11</sup>

Aside from the discrimination, if the Fourteenth Amendment applies, the constitutionality under the Due Process Clause of laying a tax on a foreign corporation based upon its entire capital stock might raise a

<sup>6</sup> *Bank of Augusta v. Earle*, 13 Peters 519, 588.

<sup>7</sup> *Southern Ry. Co. v. Greene*, 216 U. S. 400. And see the opinion of Mr. Justice White in *Western Union Tel. Co. v. Kansas*, *supra*; *Pembina Mining Co. v. Pa.*, *supra*.

<sup>8</sup> If, as in some instances, the corporation is permitted to do business under a license renewable from year to year, it would seem arguable that having been properly admitted, such corporation was entitled to constitutional protection even after the license had expired. The contrary seems to have been held, but not without dissent, in *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110.

<sup>9</sup> *Southern Ry. Co. v. Greene*, *supra*.

<sup>10</sup> *Adams Express Co. v. Ohio*, 165 U. S. 194.

<sup>11</sup> *Southern Ry. Co. v. Greene*, *supra*. The Massachusetts court in deciding the principal case considered that the tax in fact laid no heavier burden on the foreign corporation. See *White Dental, etc. Co. v. Commonwealth*, 212 Mass. 35. The Supreme Court, however, clearly held that whether discriminatory or not, the tax was not unconstitutional. 34 Sup. Ct. 15, 20.

serious question. Even upon a domestic corporation, a personal tax based on property without the jurisdiction is invalid.<sup>12</sup>

The business done is a legitimate subject for taxation,<sup>13</sup> but a tax based on capital stock has no relation to the business done within the state. With a corporation doing a large interstate business, such a tax might be more than the receipts of the business itself. It would seem, therefore, on the reasoning suggested, that the result in the principal case is incorrect.

## RECENT CASES.

**ADVERSE POSSESSION — AGAINST WHOM TITLE MAY BE GAINED — RAILROAD COMPANY.** — The plaintiff maintained, for more than the statutory period, a building which was an encroachment on the right of way of the defendant railway company. *Held*, that no title was acquired thereby. *Conwell v. Philadelphia & R. Ry. Co.*, 88 Atl. 417 (Pa.).

Where a railroad's right of way is limited to an easement over property the fee of which is vested in the sovereign, no title to the land can be acquired by adverse possession because of the public policy which excepts the sovereign's land from the operation of the Statute of Limitations. *Union Pac. Ry. Co. v. Kindred*, 43 Kan. 134, 23 Pac. 112; *Kindred v. Union Pac. R. Co.*, 168 Fed. 648. A like result is reached when the railroad is built on land in which the government, as grantor, has a possibility of reverter. *Union Pac. Ry. Co. v. Townsend*, 190 U. S. 267; *McLucas v. St. Joseph & G. I. Ry. Co.*, 67 Neb. 603, 97 N. W. 312. The principal case goes a step further by holding that a railroad right of way, as such, is exempt from the operation of the statute. The result is justified by the vital public interest in railroads which makes it fair to say that land devoted to their rights of way or terminal facilities is impressed with a public use. See *Hannibal & St. J. R. Co. v. Totman*, 149 Mo. 657, 662, 51 S. W. 412, 413. Little support is found to-day for the position taken by one court in reaching a conclusion contrary to the principal case, that railroads are operated primarily for the benefit of their stockholders. See *Pittsburgh, C. C. & St. L. Ry. Co. v. Stickley*, 155 Ind. 312, 315, 58 N. E. 192, 193. The Statute of Limitations being no more than a rule of policy for the repose of titles, it seems correct to recognize an exception to it when, as here, the countervailing policy of the preservation of public rights is involved. No exemption is claimed for the general corporate property of the railroad. *Dela-ware, L. & W. R. Co. v. Tobyhanna Co.*, 228 Pa. 487, 77 Atl. 811. And it is submitted that cases holding that land originally secured for use as a right of way, but subsequently abandoned, may be acquired by adverse possession, are not inconsistent with the principal case. *Spottiswoode v. Morris & E. R. Co.*, 61 N. J. L. 322, 40 Atl. 505. Such property was obviously unnecessary for the performance of the public duty.

**ALIENS — NATURALIZATION OF ALIENS — WHO IS A "FREE WHITE PERSON" WITHIN FEDERAL NATURALIZATION LAW.** — The plaintiff applied for naturalization as a white person, maintaining that as a high caste Hindu of pure blood he was a member of the Aryan race. *Held*, that he is entitled to naturalization. *In re Akhay Kumar Mozumdar*, 207 Fed. 115 (Dist. Ct., E. D. Wash., N. D.).

<sup>12</sup> *Union Transit Co. v. Kentucky*, 199 U. S. 194.

<sup>13</sup> See *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300, 319.



Former cases have held a Syrian, an Armenian, and a Parsee entitled to naturalization as "free white persons." See 23 HARV. L. REV. 561; 24 HARV. L. REV. 150. The principal case follows from those. The argument is that the phrase employed by the statute is merely a "catch-all" for others than negroes and Indians; that Mongolians and Asiatics have been excluded by judicial construction; and hence that all Europeans and Asiatics not allied to those races are eligible. See 23 HARV. L. REV. 561.

**BILLS AND NOTES — SET-OFF BY SURETY MAKER OF PROMISSORY NOTE AGAINST INSOLVENT BANK.** — During insolvency proceedings against the defendant bank, the appellant, a surety co-maker of a promissory note payable to the bank, filed an intervening petition seeking to have her deposit set off in payment of the note. The principal maker of the note was solvent. *Held*, that the petition be denied. *Knaffle v. Knoxville Banking & Trust Co.*, 159 S. W. 838 (Tenn.).

The court in the principal case assumes that at law the maker of a note is absolutely liable thereon irrespective of a suretyship relation, and such has been the construction placed by the courts on §§ 119, 120, and 192 of the Negotiable Instruments Law. *Vanderford v. Farmers' Bank*, 105 Md. 164, 66 Atl. 47; *Cellers v. Meachem*, 49 Ore. 186, 89 Pac. 426; *contra*, *Fullerton Lumber Co. v. Snouffer*, 139 Ia. 176, 117 N. W. 50. See 26 HARV. L. REV. 366. This construction seems questionable, and certainly the result is undesirable as doing away with the established common-law suretyship defenses. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 117; 11 Am. Law Notes, 105. If the above construction were adopted in the principal case, the appellant, being absolutely liable, should be allowed the well-recognized right to an equitable set-off against an insolvent creditor. See WATERMAN, SET-OFF, RECOUPMENT, AND COUNTER CLAIM, § 396. But the court holds that, irrespective of the effect of the statute on the liabilities of the parties at law, a court of equity can consider the true relation between the parties. *Building and Engineering Co. v. Northern Bank*, 206 N. Y. 400, 99 N. E. 1044. This reasoning seems unsound, as statutes are to be considered as framed with reference to equitable as well as legal doctrines, unless otherwise expressly stated. See *Edwards v. Edwards*, 2 Ch. D. 291, 297; ENDLICH, INTERPRETATION OF STATUTES, 446. It seems probable that the court, in using this language, is indirectly disagreeing with the above generally accepted construction. But if the common construction is incorrect and the common-law doctrines of suretyship are not abolished, the fact that the supreme courts of six states have decided otherwise, and that three states, Wisconsin, Illinois, and Kansas, have refused to adopt the sections in question in their present form, would seem to make an amendment of these sections imperative. See 26 HARV. L. REV. 594-596.

**CARRIERS — PASSENGERS: DUTY TO ACCEPT AND CARRY PASSENGERS — RIGHT OF SICK PASSENGERS TO DEMAND TRANSPORTATION IN BAGGAGE CAR.** — The plaintiff's intestate offered himself to the defendant for transportation to Atlanta where he was to undergo an operation for appendicitis. He was upon a cot and demanded the right to be placed in the baggage car. The defendant refused, and the deceased was taken into the smoking car, in which it was impossible to place him in other than a cramped position. This resulted in the bursting of the appendix, causing his death. *Held*, that the plaintiff may not recover. *Central of Georgia Ry. Co. v. Fleming*, 79 S. E. 369 (Ct. App., Ga.).

The plaintiff argued that the defendant owed a duty to the deceased to carry him in the baggage car. There is almost no authority on the question. Where a person is unattended and so seriously ill as to require medical aid, it was held that the carrier might refuse transportation altogether. *Connors v. Cunard Steamship Co.*, 204 Mass. 310, 90 N. E. 601. There, however, the carrier's re-

fusal did not deprive the applicant of proper medical treatment, while in the principal case it probably did. It has been said that the carrier is under a duty to transport an insane man, but not in the baggage car. See *Owens v. Macon & B. R. Co.*, 119 Ga. 230, 232, 46 S. E. 87, 88. Surely the carrier has some duty to transport such unfortunates. It is an extraordinary duty, however, and its performance should be left to the carrier's discretion; and if this discretion is reasonably exercised, the carrier should be under no liability.

CONSENT — EFFECT IN PARTICULAR ACTIONS — RECOVERY AGAINST SALOON KEEPER UNDER CIVIL DAMAGE LAWS. — The plaintiff voluntarily became intoxicated. While in that condition he lost control of a team which he attempted to drive and suffered serious injuries. He now sues the liquor seller, his wife having previously recovered for loss of support. *Held*, that he may recover. *Henkel v. Boudreau*, 143 N. W. 236 (Neb.).

The plaintiff's husband died from the effects of liquor sold him by the defendant. It was proved that the plaintiff herself furnished the money with which the liquor was bought. She now sues the saloon keeper for destroying her means of support. *Held*, that she may recover. *Colman v. Loeper*, 143 N. W. 295 (Neb.).

Both of these actions were brought under a statute providing that whoever sells liquor "shall pay all damages that the community or individuals may sustain in consequence of such traffic." COBBEY'S ANN. STATUTES, § 7165. Under the Nebraska decisions the defense *volenti non fit injuria* will not bar an action under this statute. *Buckmaster v. McElroy*, 20 Neb. 557, 31 N. W. 76. This position has been criticized by textbook writers. See BLACK, INTOXICATING LIQUORS, § 291, and cases there collected. And in general, under similar statutes, recovery has been refused to the drunkard himself for damages caused by his own intoxication. *Lenand v. Linck*, 71 Ill. App. 358; *Brooks v. Cook*, 44 Mich. 617. Also the wife who consents to the purchase of the liquor has been barred. *Engleken v. Hilger*, 43 Iowa 563; *Rosencrantz v. Shoemaker*, 60 Mich. 4, 26 N. W. 794. *Contra*, *Eays v. Lilly*, 217 Ill. 582, 75 N. E. 552 (where, however, this fact was allowed to mitigate damages). At common law it was not a tort to sell intoxicating liquor to an able bodied man. *Cruse v. Aden*, 127 Ill. 231, 20 N. E. 73. And a statute which creates a new remedy must ordinarily be construed as subject to the general rules as to recovery at common law. *Western Union Tel. Co. v. McDaniel*, 103 Ind. 294, 2 N. E. 709. Upon this reasoning the Nebraska cases seem wrong. But, on the other hand, the Nebraska result is correct if the clear intent of the legislature was to include the drunkard himself among those protected. Where a statutory duty of protection to those he employs has been imposed upon an employer, precisely this result has been reached, for the employee is not allowed to bar himself by assuming the risk. *Narramore v. Cleveland Ry. Co.*, 96 Fed. 298. It has been urged in explanation of this that the civil liability is created to insure achieving the desired result, because to bar suit by the employee will render the statute nugatory. See 26 HARV. L. REV. 646. This reasoning, however, does not apply to the liquor statutes, since these statutes, by giving every injured member of the community the right to sue, provide the required deterrent. And furthermore, it is difficult to believe that the legislature set out deliberately to create new affirmative rights in favor of drunkards. For further discussion of what statutory torts are barred by consent, see 25 HARV. L. REV. 463.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — CONSTITUTIONALITY OF NEGRO SEGREGATION IN SEPARATE RESIDENCE DISTRICTS UNDER THE FOURTEENTH AMENDMENT. — An ordinance of the city of Baltimore provided that no white persons or negroes should thereafter reside in blocks then occupied for residences exclusively by the other race. *Held*, that the ordinance does not



conflict with the Fourteenth Amendment to the Constitution of the United States. *State v. Gurry*, 88 Atl. 546.

For a discussion of the principles involved, see NOTES, p. 270.

CONSTRUCTIVE TRUSTS — MISCONDUCT BY NON-FIDUCIARIES — CAN ONE GUILTY OF HOMICIDE ACQUIRE TITLE BY HIS CRIME? — In probate proceedings the plaintiff took out a summons asking that one of the defendants be struck out of the proceedings as having no interest. This defendant had been convicted of the manslaughter of the testator, and under two of the alleged wills being propounded took an interest in the estate. *Held*, that the defendant must be struck out of the proceedings. *Hall v. Knight and Baxter*, 135 L. T. J. 550 (Ct. of Appeal).

The majority of cases have held that the slayer as heir or devisee retains both legal and beneficial interest in property inherited from his victim. *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935; *Carpenters Estate*, 170 Pa. St. 203, 32 Atl. 637. A few courts have held that the felon does not take even the legal interest. *Perry v. Strawbridge*, 209 Mo. 621, 108 S. W. 641. This has been held to apply as well to the case of manslaughter as to murder. *Lundy v. Lundy*, 24 Can. Sup. Ct. 650. But see *Gollnik v. Mengel*, 112 Minn. 349, 351, 128 N. W. 292, 293. This view which excludes the claimant guilty of homicide seems directly opposed to the statutes of Wills and of Distributions, for neither statute excludes a slayer from the inheritance. A third view, which does not violate the statute, is that the criminal takes legal title by the statute, but equity will decree him constructive trustee to hold the property for the innocent heirs. See *Ellerson v. Westcott*, 148 N. Y. 149, 154, 42 N. E. 540, 542; AMES, LECTURES ON LEGAL HISTORY, 310. The principal case, the first English one directly in point, appears to adopt this view, excluding the manslaughterer from the proceedings, probably by applying the equity rule under the Judicature Act, 36 & 37 Vict. c. 66, § 24. The constructive trust theory is open to the objection that the other heirs who claim as *cestuis* were deprived by the homicide merely of a naked chance that the deceased, had he lived, might have revoked the will, or in the case of intestacy, that the heir responsible for the death might have predeceased the ancestor. If a constructive trust is looked upon broadly as a remedy, it may be proper to deprive the felon of property unconscionably obtained, permitting the heirs, as next in line, to receive a windfall. It is, however, somewhat anomalous to allow persons without title and not intended by anyone to have an interest, to claim property in court because of another's wrong that worked them no substantial injury. Furthermore, the constructive trust doctrine is not completely effective, because if the criminal sells to a *bonâ fide* purchaser, the heirs are cut off. It is submitted that legislative action disqualifying one guilty of the homicide from taking even the legal title is better than the creation of a constructive trust. Two states have such statutes. Iowa Code (Supplement 1907), § 3386; Cal. Civ. Code (1906) § 1409. The civil law expressly provides that the slayer shall be deprived of the property to which he succeeds. 4 TULLIER, DROIT CIVIL FRANÇAIS, 113; 3 WINDSCHEID, PANDECTENRECHTS, §§ 669, 670; La. Civ. Code, 1560, 1710.

CRIMINAL LAW — FORMER JEOPARDY — ACQUITTAL BEFORE COURT WHERE SOME OF JUSTICES WERE INELIGIBLE. — Defendants had been indicted for violating a coal-mining statute, and had been acquitted by a court, of which two of the justices were ineligible. A writ of *certiorari* was asked to quash the acquittal. *Held*, that the defendants having been once in jeopardy, the writ will not lie. *Rex v. Simpson*, 136 L. T. J. 10.

The fundamental principle, that a man shall not be put twice in peril for the same offense, being embodied in the national and state constitutions, has

been treated with a degree of rigidity which probably would not have obtained at common law. Therefore, as between this country and England, where the question is largely one of precedent, a difference is shown in the method of approach. Cf. *State v. Norvell*, 2 Yerg. (Tenn.) 24, and *Windsor v. Queen*, 10 Cox C. C. 276, aff'd. 7 B. & S. 490. But any such difference would not account for the decision in the principal case, which is contrary to the authority of analogous cases in both the United States and England. *Rex v. Bitton*, 6 C. & P. 92; *Rex v. Bowman*, 6 C. & P. 337; *People v. Connor*, 142 N. Y. 130, 36 N. E. 807; *State v. Phillips*, 104 N. C. 786, 10 S. E. 463. A judgment rendered by a court of incompetent jurisdiction is illegal and void. *Commonwealth v. Peters*, 12 Metc. (Mass.) 387; *Murray v. American Surety Co.*, 17 C. C. A. 138, 70 Fed. 341. Therefore an acquittal by such a tribunal should not be a bar to a later action before a court which has jurisdiction. Moreover, the English Criminal Procedure Act of 1857, by stipulating that it is sufficient for the defendant to plead that he had been lawfully convicted or acquitted of the offense charged, seems to have covered the point.

**DANGEROUS PREMISES — LIABILITY TO LICENSEES — EFFECT OF STATUTE REQUIRING CAN CONTAINING GASOLINE TO BE MARKED.** — The plaintiff, a licensee, having permission to build a fire and warm himself in the defendant's shop, while attempting to do so was injured by pouring gasoline, which he mistook for kerosene, into the stove. The plaintiff had no right to use the contents of the can. The can containing the gasoline was unmarked, which was in violation of a statute requiring gasoline to be kept in a red can plainly lettered. *Held*, that a demurrer to this declaration be sustained. *Molin v. Wisconsin Land Co.*, 20 Det. L. N. 895 (Mich., Menominee Co., C. C.).

The unlabeled gasoline was at most a latent defect in the defendant's premises. See *Harper v. Standard Oil Co.*, 78 Mo. App. 338, 344. And there being no allegation of any customary use of kerosene for the building of fires or any other purpose, the defendant could not foresee danger to the plaintiff, and so owed him no duty at common-law. *Armstrong v. Medbury*, 67 Mich. 250, 34 N. W. 566. But the statute imposed an obligation upon the keeper of gasoline, for the violation of which he is punishable criminally by fine and imprisonment. MICH. PUB. ACTS 1909, Act 37. If a defendant owes a duty of care at common law as regards his conduct toward a plaintiff, the violation of a criminal statute declaratory of that conduct will constitute negligence *per se*. *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237. But if there is no common-law duty of care, the breach of a penal statute should not make the defendant liable civilly, unless the legislature shows an intention to give a civil remedy by express words or strong implication. *Behler v. Daniels*, 19 R. I. 49, 31 Atl. 582. *Mack v. Wright*, 180 Pa. 472, 36 Atl. 913. *Contra*, *Parker v. Barnard*, 135 Mass. 116; see *Butz v. Cavanagh*, 137 Mo. 503, 511, 38 S. W. 1104, 1105. This last is entirely a question of statutory interpretation. *Atkinson v. Waterworks Co.*, 2 Ex. Div. 441; *Vallance v. Falle*, 13 Q. B. D. 109. And it is submitted that no such intention on the part of the legislature can be drawn from this statute. The courts generally have been far too loose in allowing civil remedies under such statutes. But in the principal case, even if the plaintiff be allowed the benefit of the statute still the court's result is correct. For although the unlawful use of the contents of the can did not forfeit his license (*Spades v. Murray*, 2 Ind. App. 401, 28 N. E. 709), the plaintiff should be barred on the ground of contributory illegality. *Banks v. Highland, etc. Ry. Co.*, 136 Mass. 485.

**ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — CONTRACT INVOLVING BREACH OF PRIOR CONTRACT.** — The defendant was under contract to perform certain services for a third party. The plaintiff induced the



defendant to break this contract and enter into a similar one with him. The plaintiff sues for breach of this second contract. *Held*, that the contract was illegal, and the plaintiff may not recover. *Wanderers Hockey Club v. Johnson*, 25 West. L. R. 434 (Brit. Col.). For a discussion of the question involved, see NOTES, p. 273.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — PRIVATE AGREEMENT OF DIRECTOR WITH STOCKHOLDER. — The B. Co., being in financial straits, by an agreement approved in general meeting voted to allow the defendant two representatives on the board of directors in return for his providing additional capital. Accordingly, the defendant made the plaintiff a director of the B. Co., and privately contracted to pay him £200 yearly so long as he remained on the board, but it was not contemplated that the plaintiff should promote the defendant's interests as distinguished from those of the shareholders as a whole. *Held*, that the plaintiff may recover on the contract. *Kregor v. Hollins*, 109 L. T. R. 225 (Ct. of App., Oct. 18, 1913).

A contract by an employee with a third party to assume a position which might lead him to act to his employer's prejudice is illegal. *Rice v. Wood*, 113 Mass. 133; *Goodell v. Hurlbut*, 5 N. Y. App. Div. 77. The agreement being calculated to bias the agent's mind, that it does not in fact do so is immaterial. *Harrington v. The Victoria Graving Dock Co.*, 3 Q. B. D. 549. The situation of the corporation director is analogous, for to him the shareholders look for disinterested transaction of corporate business. *West v. Camden*, 135 U. S. 507. Wherever an employer fully apprised of this other interest of his employee clearly assents thereto, the contract is unobjectionable. *Rice v. Wood*, *supra*; *Bell v. McConnell*, 37 Ohio St. 396. But there must be unmistakable evidence that the employer assented, having a full knowledge of all the facts. *Marshall v. Reed*, 32 Pa. Super. Ct. 60. The court reasons that the contract sued on is not void as against public policy, because of the fact that the original agreement by the B. Co. with the defendant must have contemplated that the latter would contract to pay his directors. But this is accepting as a substitute something less than the full disclosure regularly required to validate a dual agency.

INTERNATIONAL LAW — NATURE AND EXTENT OF SOVEREIGNTY — JURISDICTION OVER VESSELS. — Death was caused by the explosion of a boiler on a Michigan vessel in the Canadian waters of the Great Lakes. *Held*, that the law of Michigan governs. *Thompson T. & W. Ass'n. v. McGregor*, 207 Fed. 209 (C. C. A. Sixth Circ.).

For a discussion of the jurisdiction over vessels, see this issue of the REVIEW, at p. 268.

INTOXICATING LIQUORS — LEGISLATION — INTERPRETATION: APPLICATION OF PROHIBITIONS AGAINST SELLING AND TRANSPORTING TO THE PURCHASER OR HIS AGENT. — A city ordinance prohibited the sale or transportation of intoxicating liquors. The defendant, acting as agent, purchased and carried to his principals some whiskey sold in violation of the ordinance. He was indicted for transporting contraband liquors. *Held*, that the prohibition against the transportation does not apply to the buyer's agent. *City of Anderson v. Fant*, 79 S. E. 641 (S. C.).

It has been held that a statute prohibiting the sale of liquor does not apply to the purchaser, because, by prohibiting only selling, it impliedly excludes buying from its scope. *State v. Rand*, 51 N. H. 361. See *Commonwealth v. Willard*, 22 Pick. (Mass.) 476, 479. The buyer, however, is not indicted for the act of buying, but as a principal in causing the crime of selling. And one

aiding in the sale has been held where the act was not that of buying. *Johnson v. People*, 83 Ill. 431. Nevertheless, the buyer is generally not held. *Lott v. United States*, 205 Fed. 28. The principal case gives as an explanation that if the buyer were held in prosecuting the seller, he could not then be forced to testify to the sale because of self-incrimination. But this interpretation of the statute is valid only if such an intention may be implied. And it seems improbable that such positive considerations of policy were present in the minds of the legislators. Rather, it would seem that since the statute was enacted to protect the buyer from himself there was an entire absence of intent to make him liable under it. Cf. *Regina v. Tyrell*, [1894] 1 Q. B. 710. If the buyer is not liable for the act of buying, he is surely exempt from liability for an act so necessarily consequent upon buying as the transportation of the goods purchased. The principal case seems correct in extending this exemption to the agent of the buyer. Cf. *Bonds v. State*, 130 Ala. 117, 30 So. 427; *Campbell v. State*, 79 Ala. 271.

LEGACIES AND DEVISES — MARSHALLING ASSETS — EXONERATION OF SPECIFIC DEVISEE FROM COVENANT RUNNING WITH THE LAND. — A lessor covenanted for himself and assigns to erect a building on the demised premises on demand by the lessee. The latter promptly demanded performance, but without success. Eight years later the lessor died, having specifically devised the reversion. His executor, upon a fresh demand, performed the covenant, and now seeks reimbursement from the specific devisee. Held, that the executor cannot recover. *In re Hughes*, [1913] 2 Ch. 491.

As the covenant bound both the devisee and the executor, the question is simply which must exonerate the other. The result is probably correct on the ground that the covenant had become an overdue obligation of the testator before his death. *Barry v. Harding*, 1 J. & L. 475; *Fitzwilliam v. Kelly*, 10 Hare 266. But the court's reasoning would be equally applicable, if no demand had been made before that time. It is found that the covenant "was intended to be performed forthwith" and not "to remain attendant on the lease during its currency," and held that the burden of a covenant so intended must fall on the general estate. *Eccles v. Mills*, [1898] A. C. 360. The legal principle laid down is probably sound. Where land contracted for is specifically devised, the executor must discharge it from the vendor's claim for the piece. *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231. And a covenant by either party to a lease to make some immediate improvement — intended to be finally performed and over with shortly after the outset of the tenancy — may fairly be treated as a price paid for the reversionary or leasehold interest, which the covenantor acquires. *Marshall v. Holloway*, 5 Sim. 196. The principle also harmonizes with the rule that equity — which prescribes the order of marshalling assets — will impose the burden of a contract upon the land or the promisor according to the original intent of the parties in making it. *Mansel v. Norton*, 22 Ch. D. 769; *John Brothers Abergarw Brewery Co. v. Holmes*, [1900] 1 Ch. 188. But a covenant imposing a contingent liability which may persist for years must be intended to "remain attendant on the lease." The mere expectation that it will be performed soon does not alter the character of the covenantor's promise. To treat such an agreement like the temporary, unconditional covenant of *Eccles v. Mills* would probably violate the testator's intent and certainly cause serious inconvenience. The early English rule that a specific bequest of stock not fully paid up carried with it the right to have future calls met by the executor has been abandoned for these very reasons. *Blount v. Hopkins*, 7 Sim. 43; *Armstrong v. Burnet*, 20 Beav. 424; *Addams v. Ferick*, 26 Beav. 384. Probably the court would not have carried its reasoning in the principal case to its logical result of holding the executor had the demand been made after the testator's death.



**LIBEL AND SLANDER — PUBLICATION — BY ONE PARTNER TO ANOTHER.** — The defendant uttered to his business associate defamatory matter concerning the plaintiff. *Held*, that there was no publication upon which to found an action. *Kirschenbaum v. Kaufmann*, 50 N. Y. L. J. 406 (N. Y. City Ct.).

It is a broad rule of law that defamation communicated to any third person is, without more, a publication. *Snyder v. Andrews*, 6 Barb. (N. Y.) 43. And to this proposition there are few exceptions. Defamatory statements made between husband and wife about others, however, constitute one such exception. This is based on the common-law principle that husband and wife are one person. *Sesler v. Montgomery*, 78 Cal. 486, 21 Pac. 185; *Wennhak v. Morgan*, 20 Q. B. D. 635. A New York decision, moreover, which the principal case professes to follow, holds that the dictation of a business letter by the manager of a corporation to a stenographer in its employ, being in effect but one corporate act, is not a publication. *Owen v. Ogilvie Publishing Co.*, 32 N. Y. App. Div. 465; see a criticism of this case in 12 HARV. L. REV. 355. The court in the case last cited intimates that were no corporation involved there might be a publication. And such is the law. *Pullman v. Hill*, [1891] 1 Q. B. 524. See *Boxsius v. Goblet Frères*, [1894] 1 Q. B. 842, 846; *Gambrill v. Schooley*, 93 Md. 48, 61, 48 Atl. 730, 731. See 15 HARV. L. REV. 230. Regardless of the soundness of this distinction, it seems difficult to bring the principal case within it. Individual identity is not lost by entering into partnership. And business relationship would seem preferably a ground for according privilege rather than for denying the existence of a *prima facie* case. *Lawless v. Anglo-Egyptian Cotton & Oil Co.*, L. R. 4 Q. B. 262; *Edmondson v. Birch & Co.*, [1907] 1 K. B. 371.

**MASTER AND SERVANT — ASSUMPTION OF RISK — EFFECT OF WARNING THAT EMPLOYEES USING ELEVATOR DO SO AT THEIR OWN RISK.** — Plaintiff's husband, employed by the defendant, was killed while riding on defendant's freight hoist, which bore a sign: "Dangerous. Keep off. Persons riding this hoist do so at their own risk." The jury were instructed that if they believed from the evidence that the warning was posted for the purpose of evading the master's duty to provide safe appliances, disregarding the warning would not constitute a defense. *Held* that the charge was correct. *Selden-Breck Const. Co. Linnett*, 134 Pac. 956 (Ok.).

A qualified permission, such as in the principal case, is generally held to cast all risk on the one who accepts it. *Burns v. Boston Elevated*, 183 Mass. 96, 66 N. E. 418. The court argues that that result does not follow here, because the master was trying to evade his duty to provide safe appliances. It is hard to see why the assumption of risk is not as clear in one case as in the other. Moreover, the evasion of the master's duty does not prevent the employee's assuming the risk when the master tells the servant to accept conditions as they are or leave the employment. *Lamson v. American Axe & Tool Co.*, 177 Mass. 144, 58 N. E. 585. But there has grown up in modern law a policy of dealing strictly with employers. In England, indeed, continuing in a business, even where certain dangers are known to exist, is not assumption of risk. *Smith v. Baker*, [1891] A. C. 325. In this country an employee is never held to have assumed a risk unless it be shown that he exactly comprehended its nature. *Miner v. Franklin County Telephone Co.*, 83 Vt. 311, 75 Atl. 653; *O'Toole v. Pruyn*, 201 Mass. 126, 87 N. E. 608, *sub nom.* *O'Toole v. N. E. Gas & Coke Co.* These results seem to show a recognition by the courts that the pressure of economic conditions may destroy an employee's freedom to select the conditions under which he shall work. On this basis the decision in the principal case can be supported.

**MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — EXTRATERRITORIAL EFFECT.** — An employee who was insured by his employer under the

Massachusetts Workmen's Compensation Act of 1911 was injured in the scope of his employment in New York and sought to recover from the Mutual Liability Insurance Co. *Held*, that the act contemplates no extraterritorial effect. *In re American Mutual Liability Insurance Co.*, 102 N. E. 693 (Mass.).

The principles involved are discussed in this issue, page 271.

NUISANCE — NATURE OF RIGHT TO MAINTAIN NUISANCE — EFFECT OF ACTION IN RELIANCE UPON PAROL LICENSE. — The plaintiff sued the defendant, an adjoining landowner, for maintaining a nuisance in the form of a pumping station. The defendant claimed an irrevocable license to maintain the nuisance because the plaintiff's grantor, in consideration of the payment of a consensual judgment awarding past and future damages for the nuisance, had discharged the defendant from all claims of this character which at any time might accrue to the owner of the property. *Held*, that the plaintiff can recover. *Panama Realty Co. v. City of New York*, 143 N. Y. Supp. 893 (N. Y. App. Div.).

This decision reverses the holding of the lower court to the effect that the defendant had acquired an irrevocable license to maintain the nuisance. The court below considered the right to enjoy land free from nuisance as in the nature of a servitude imposed on the adjoining land. It argued, therefore, that a license to maintain a nuisance, when acted upon, would extinguish this easement or right of the owner of the annoyed land to enjoy his land free from nuisance. For a criticism of the decision of the lower court, see 26 HARV. L. REV. 460. The upper court adopts the proper view that the right to maintain a nuisance to adjoining land is essentially an easement, and can arise, therefore, only by grant or prescription.

PATENTS — NATURE AND REQUISITES FOR PATENT — PREVIOUS ABANDONMENT AS A BAR. — An application was made for a process patent. The applicant had, more than two years before, obtained an apparatus patent, and his application had completely disclosed the process which was the subject of his present application. *Held*, that the process idea, having been abandoned, could not be patented. *Re Leonard's Application for a Patent*, 13 East. L. R. 280 (Canada).

In the United States, as well as in Canada, if an inventor in his application distinctly limits his claims for a patent to less than the full scope of the novel ideas disclosed, the unclaimed inventions are made public property. *Underwood v. Gerber*, 149 U. S. 224, 13 Sup. Ct. 854; *McClain v. Ostmayer*, 141 U. S. 419, 12 Sup. Ct. 76. It is commonly said that the unclaimed inventions are abandoned or dedicated to the public. *Stirrat v. Excelsior Mfg. Co.*, 61 Fed. 980. These terms, it is submitted, are fictitious, as they imply an intent on the part of the inventor which surely does not exist save in rare instances. The doctrine of abandonment really operates as a forfeiture, in certain circumstances, of the right of the inventor to secure a monopoly of his invention by patent. That this is the true significance of the doctrine is indicated by the reluctance of the courts to find abandonment and their insistence that the proof of it be convincing. *Mast v. Dempster Mill Mfg. Co.*, 82 Fed. 327, 27 C. C. A. 191; *Ide v. Trorlicht, Duncker, & Renard Carpet Co.*, 115 Fed. 137, 53 C. C. A. 341. The courts, nevertheless, treat this fictitious intention as a question of fact and, in accordance with that view, consider that the *prima facie* appearance of abandonment by unclaimed disclosure in the application may be rebutted by the filing of a separate application for patent on the unclaimed idea. *Victor Talking Machine Co. v. American Graphophone Co.*, 145 Fed. 350, 76 C. C. A. 180; *Suffolk v. Hayden*, 3 Wall. (U. S.) 315. The result of the principal case would be reached in the United States, not only because of the abandonment, but also on account of the provision in the United States statute that an invention which has been in public



use in the United States for more than two years cannot be the subject of a patent. U. S. REV. STAT. § 4886; *Roemer v. Simon*, 95 U. S. 214.

PRESUMPTIONS — EXISTENCE AND EFFECT OF PRESUMPTIONS IN PARTICULAR CASES — CHILD-BEARING: PRESUMPTION THAT A WOMAN OF ADVANCED AGE IS INCAPABLE OF CHILD-BEARING.—The defendant having contracted to buy certain land of the plaintiff refused to perform on the ground that a widow more than seventy years of age might have children who would be entitled to an interest in the property. *Held*, that specific performance will be granted. *Whitney v. Groo*, 40 D. C. App. Cas. 496.

In cases like the present, American courts have heretofore uniformly held to the presumption that one may have children throughout life. *Read v. Fite*, 8 Humph. (Tenn.) 328; *List v. Rodney*, 83 Pa. 483; *Westhofer v. Koons*, 144 Pa. 26. These cases are clearly distinguishable from the authorities on which they are based. For the purpose of determining questions of remoteness involved in applying the rule against perpetuities, all living persons are regarded as capable of having issue. *Jee v. Audley*, 1 Cox 324. Such a presumption is entertained in determining a wife's right of dower. See 1 THOMAS, COKE UPON LITTLETON, 579. For the same reason, the estate of tenant in tail with possibility of issue extinct can never arise so long as persons whose issue might take are still living. *Id.* 551. These have now become well-established principles of real property touching the creation and termination of estates, and as such unalterable. In the principal case no rule of property law is involved. The purchaser can demand only a title free from reasonable doubt. *Lyddale v. Weston*, 2 Atk. 19. This is merely a question of fact; and it is submitted that the decision in this case is warranted in the light of human experience, and deserving of great respect for breaking away from artificial rules, and applying common-sense principles. Similar decisions have been rendered by common-law courts outside of the United States. *Browne v. Warnock*, 1r. R., 7 Ch. D. 3; *In re Tinning and Webber*, 25 Can. L. T. (Occasional Notes) 38. The same result has been reached in cases involving the distribution of trust funds. *Leng v. Hodges*, Jac. 585.

QUASI-CONTRACTS — RIGHTS AND OBLIGATIONS OF PARTIES UNDER CONTRACT MADE UNENFORCEABLE BY STATUTE OF FRAUDS.—The plaintiff, a broker, was employed to sell timber lands for the defendant under a contract unenforceable by the Statute of Frauds. He procured a customer who bought the property. *Held*, that the plaintiff cannot recover on a *quantum meruit*. *Cushing v. Monarch Timber Co.*, 135 Pac. 660 (Wash.).

While the Statute of Frauds bars any action on the contract itself, the refusal to allow a plaintiff to recover for services actually rendered unjustly enriches the defendant. See 21 HARV. L. REV. 544. Accordingly, in analogous cases, a recovery on a *quantum meruit* has generally been allowed. *Wonsettler v. Lee*, 40 Kan. 367, 19 Pac. 862; *Pulbrook v. Lawes*, 1 Q. B. D. 284. *Contra*, *Leimbach v. Regner*, 70 N. J. L. 608, 57 Atl. 138. The argument against granting quasi-contractual relief is that it would defeat the purpose of the statute. The fallacy here lies in mistaking the nature of quasi-contractual relief. It is based on an obligation imposed by law for the purpose of producing an equitable result, and not on the contract of the parties. See 24 HARV. L. REV. 158. Moreover, since the services have been rendered, there is no danger of fraud or false testimony as to that fact, so that the evil which the statute is intended to guard against cannot occur. Finally, denying the relief effects a palpable injustice never contemplated by the designers of the statute.

RESTRAINT OF TRADE — STATE ANTI-TRUST LEGISLATION — STATUTE PROHIBITING COMBINATIONS OF STOCK CORPORATIONS FOR THE CREATION OF A

**MONOPOLY NOT APPLICABLE TO COMBINATIONS OF PUBLIC SERVICE COMPANIES UNDER COMMISSION CONTROL.** — The New York stock corporation law provides that no stock corporation shall combine with any other corporation or person for the creation of a monopoly, or the unlawful restraint of trade, or for the prevention of competition in any necessary of life. The defendant is a holding company which controls practically the entire street railway business of the city of New York. *Held*, that it is not a combination within the prohibition of the act. *Continental Securities Co. v. Interborough Rapid Transit Co.*, 207 Fed. 467 (Dist. Ct., S. D. N. Y.).

The question has aroused great diversity of opinion. The lower New York courts have held that such combinations do not violate the act. *Attorney-General v. Consolidated Gas Co. of N. Y.*, 124 App. Div. 401, 108 N. Y. Supp. 823; *Attorney-General v. Interborough-Metropolitan Co.*, 125 App. Div. 804, 110 N. Y. Supp. 186. The federal courts have maintained a contrary view. *Burrows v. Interborough-Metropolitan Co.*, 156 Fed. 389; *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945. The state decisions argue that the statute was not intended to apply to public service companies because they are subject to legislative regulation in the interests of the public; and that, if this cannot be inferred from the act itself, it is evident from the passage of subsequent statutes placing public services under commission control. A literal construction of the sweeping language of the statute, however, would justify the view of the federal cases that all combinations which prevent competition are prohibited. In support of this construction are cases holding that restrictive combinations or agreements, although made by public service companies, are monopolistic and contrary to public policy or anti-trust legislation. *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 708; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290. Other decisions, however, maintain that anti-trust legislation is designed to prevent only agreements harmful to the public, and that combinations between public services are not within this description. *Yazoo & M. V. R. Co. v. Searles*, 85 Miss. 520, 37 So. 939; *State v. Central of Georgia R. Co.*, 109 Ga. 716, 35 S. E. 37. Jurisdictions which have inaugurated commission control seem to have done so believing that regulation of public service companies is preferable to competition between them. See *Weld v. Gas and Electric Light Commissioners*, 197 Mass. 556, 558, 84 N. E. 101, 102; *People ex rel. Edison Co. v. Willcox*, 207 N. Y. 86, 98, 100 N. E. 705, 708. This would indeed seem to be the better policy and to justify the courts in taking a rather liberal construction of general anti-trust statutes. *McKinley Telephone Co. v. Cumberland Telephone Co.*, 152 Wis. 359, 140 N. W. 38.

**SALES — IMPLIED WARRANTY — TITLE — RESALE OF CONFIDENTIAL REPORTS.** — R. G. Dun & Co. furnished financial reports to the plaintiff, the latter contracting not to resell. The plaintiff in breach of this agreement sold reports to the defendant, and now sues for the purchase price. Dun, after the transaction had taken place, notified the defendants of his rights, warned them to make no use of the reports, and demanded their return. *Held*, that the plaintiff may not recover. *Carbolineum Wood Preserving Co. v. Carter*, 50 N. Y. L. J. 361 (Municipal Court of the City of New York, Oct., 1913).

The court in the principal case gave the defendant a defense because of the plaintiff's breach of an implied warranty of title. In a sale under the New York act there is "an implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale." N. Y. LAWS OF 1911, c. 571, § 94. If the defendant is not a *bona fide* purchaser for value, equity will enjoin his use of the reports obtained through the plaintiff's breach of his agreement not to resell. *Dodge Co. v. Construction Information Co.*, 183 Mass. 62, 66 N. E. 204; *National Tel. News*



*Co. v. Western Union Tel. Co.*, 119 Fed. 294. At common law the defendant is not a *bond fide* purchaser for value, as an executory promise is not such value as to cut off equities. *Brown v. Welch*, 18 Ill. 343; *Keyser v. Angle*, 40 N. J. Eq. 481, 4 Atl. 641. Under the Uniform Sales Act, value is defined as "any consideration sufficient to support a simple contract"; but this provision is omitted from the act as adopted in New York, and common-law principles, therefore, prevail in that state. As the defendant can thus make no use of the goods sold him by the plaintiff, it seems clear that the warranty was broken and he should not be forced to pay for them.

#### SPECIFIC PERFORMANCE — DEFENSES — INADEQUACY OF CONSIDERATION.

— The defendant, through a real estate agent, agreed to convey real estate worth about \$12,000 and pay in cash \$15,000 in exchange for city property of the plaintiff's worth about \$15,000. The defendant's agent was secretly receiving a commission on the deal from the plaintiff. *Held*, that specific performance will not be granted. *State Security & Realty Co. v. Shaffer*, 20 Det. L. N. 772 (Mich. Sup. Ct., Sept. 30, 1913.)

The exercise of equity's jurisdiction to compel specific performance of a contract rests upon the sound discretion of the court in view of all the circumstances. *Norris v. Clark*, 72 N. H. 442, 57 Atl. 334. This specific-performance jurisdiction will not be exercised where the agreement is unconscionable, even though equity would not be justified in setting aside the contract. *Cathcart v. Robinson*, 5 Pet. (U. S.) 264. So, where there is evidence of unfair dealing or sharp practice coupled with inadequacy of consideration in the contract, specific performance will be refused. *Woolford v. Steele*, 27 Ky. L. Rep. 88, 84 S. W. 327; *Shoop v. Burnside*, 78 Kan. 871, 98 Pac. 202. By statute in some jurisdictions specific performance will not be granted unless it appears that the consideration was adequate. *White v. Sage*, 149 Cal. 613, 87 Pac. 193. But inadequacy of consideration alone is not generally enough to justify a refusal to enforce the contract specifically. *Coles v. Trecothick*, 9 Ves. 234; *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602. If, however, the inadequacy is so great as to shock the conscience of the court and be decisive evidence of unfair dealing, specific performance will be refused. *Clitheral v. Ogilvie*, 1 Desaus. Eq. (S. C.) 250. In such a case the hardship on the defendant is so great as to overcome any hardship on the plaintiff resulting from the denial of an incident of his contract, and equity is better served by leaving the purchaser to his remedy at law. See *Seymour v. Delancey*, 3 Cowen (N. Y.) 445, 517. How gross the inadequacy must be depends on the circumstances, but the principal case seems in accord with the trend of modern authority on this point. See *Worth v. Watts*, 74 N. J. Eq. 609, 611, 70 Atl. 357, 358. The court need not have based its decision entirely on this ground, however. The fact that the defendant's agent received a commission from the plaintiff without the knowledge of the defendant would seem to be sufficient evidence of collusion to justify a refusal to decree specific performance. *Fish v. Leser*, 69 Ill. 394; *Palmer v. Gould*, 144 N. Y. 671, 30 N. E. 378; *Young v. Hughes*, 32 N. J. Eq. 372. See 15 HARV. L. REV. 318, 741.

STATUTES — INTERPRETATION — MEANING OF "MANUFACTURING ESTABLISHMENT." — A bankrupt company imported preserved cherries, which it colored, flavored, bottled, and placed upon the market as "Maraschino cherries." Creditors who had furnished supplies claim a lien upon the bankrupt's property under a statute providing for such security where the business is a "rolling mill, foundry, or other manufacturing establishment." KY. STAT., § 2487; (U. S.) ACT, July 1, 1898, c. 541; BANKRUPTCY ACT, § 64 b (5); 30 STAT. AT LARGE, 563. *Held*, that the lien attaches. *In re I. Rheinstrom & Sons Co.*, 207 Fed. 119 (Dist. Ct., E. D. Ky.).

The apparently chaotic state of the authorities on the construction of the term "manufacturing establishment" is due to the fundamental principle that the intent of the legislature is the controlling consideration. Corresponding terms of similar statutes may well receive opposite interpretations in two jurisdictions, because of a difference in the legislative policies expressed by the two statutes. *Commonwealth v. Northern Electric L. & P. Co.*, 145 Pa. 105, 22 Atl. 839; *People ex rel. Brush Elec. M. Co. v. Wemple*, 129 N. Y. 543, 29 N. E. 808. It is submitted that the court in its search for a "logical rule" to fit all cases attempts to realize the impossible and fails to give proper weight to general principles of construction. As the statute in the principal case gives one class of creditors a priority over another, it should be strictly construed against the lien claimants. See *Rogers v. Currier*, 13 Gray (Mass.) 120, 134. The principle of *ejusdem generis*, that where particular words are followed by a general term the latter is designed to include only things of a like class with those previously enumerated, tends to show that only large industrial concerns were within the purview of the statute. *Pardee's Appeal*, 100 Pa. St. 408; *Newport News, etc. Co. v. United States*, 61 Fed. 488. And from the evidence quoted in the opinion, it seems a fair inference that the policy of the statute was to stimulate development of the state's mineral resources. Previous Kentucky cases present some authority for a broader interpretation. *Winter v. Howell*, 100 Ky. 163, 58 S. W. 501; *Bogard v. Tyler*, 119 Ky. 637, 55 S. W. 709. But it is submitted that the principal case involves too great a departure from this policy.

**TAXATION — GENERAL LIMITATIONS ON THE TAXING POWER — CONSTITUTIONALITY OF DISCRIMINATORY TAX ON FOREIGN CORPORATIONS DOING INTRASTATE BUSINESS.** — Two foreign corporations who had long done intrastate business in Massachusetts objected to an excise tax, imposed on foreign corporations alone and based on their capital stock, as being contrary to the Constitution. *Held*, that the tax is constitutional. *Baltic Mining Co. v. Massachusetts*, 34 Sup. Ct. 15.

For a discussion of the question of taxation of foreign corporations, see NOTES, p. 275.

**TAXATION — PARTICULAR FORMS OF TAXATION — INCOME TAX — CALCULATION OF INCOME OF MINING COMPANY.** — In assessing the income of a mining company under section 38 of the federal corporation tax of 1900, U. S. COMP. STAT. SUPP. 1911, p. 947, the collector subtracted from the total proceeds of ore sold, the expense of mining it, but not its original value in the ground. *Held*, that the tax was properly assessed. *Stratton's Independence, Limited, v. Howbert*, 207 Fed. 410 (Dist. Ct., D. Colo.), affirmed by U. S. Supreme Court, Sup. Ct. No. 457 (Dec. 1, 1913).

A land company which had leased a mine was assessed under the federal corporation tax on the royalties received from the proceeds of the sale of ore. *Held*, that such royalties do not constitute income. *Sargent Land Co. v. Von Baumbach*, 207 Fed. 423 (Dist. Ct., D. Minn.).

The Supreme Court settles this conflict in favor of the view that proceeds from the sale of ore is income. The conflicting decisions of the federal district courts each find support in authority. *Commonwealth v. Ocean Oil Co.*, 59 Pa. 61; *United States v. Nipissing Mines Co.*, 202 Fed. 803. Against the view taken by the Supreme Court it is urged that ore in the ground is capital, and that therefore its sale cannot yield an income. This argument hardly accords with the actual facts. Mining consists in exploring, raising, and selling natural deposits which, when the mine is opened, are imperfectly known, and therefore non-existent for economic purposes. The "value in the ground" comes into being gradually with the progress of the mine; hence it is really



income, and may fairly be taxed as such when its final realization in cash furnishes a convenient opportunity. It seems certain that this result must be reached under the new income tax, for much of the Supreme Court's reasoning is equally applicable to that statute, and the very small deduction expressly allowed to mine-owners "for depletion of ores" necessarily implies that the cash receipts derived from such depletion are to be treated as "gross income." INCOME TAX ACT, § 2, B, G, b. Such is the rule under the English statute, where the inference is less compelling. *Alianza Co. v. Bell*, [1906] App. Cas. 18. *Contra*, but overruled, *Knowles & Sons v. McAdam*, L. R. 3 Exch. D. 23.

TELEGRAPH AND TELEPHONE COMPANIES — STANDARD OF CARE — WHETHER COMPANY MUST EXERCISE ORDINARY OR GREAT CARE TO KEEP ITS INSTRUMENTS IN WORKING ORDER. — The defendant telephone company used a night bell to give the operator notice of calls. Owing to a defect in the mechanism of the bell, it failed to ring, and a call by the plaintiff was not answered. *Held*, that the telephone company is bound to use only ordinary care to keep its facilities in working order. *Southern Bell Telephone Co. v. Glawson*, 79 S. E. 488 (Ct. of Appeals, Ga.).

An exception to the general rule that public service companies must exercise the highest degree of care consistent with performance of the service, exists in the case of telephone and telegraph companies. A majority of cases require only ordinary care under the circumstances. *Western Union Telegraph Co. v. Hays*, 63 S. W. 171 (Tex.); see *Ellis v. American Telegraph Co.*, 13 Allen 226, 234. Some authority imposes a duty to use the utmost care. *Marr v. Western Union Telegraph Co.*, 85 Tenn. 529, 3 S. W. 496. See *Fowler v. Western Union Telegraph Co.*, 80 Me. 381, 388. The latter cases seem preferable, for the considerations of public policy which support the rule are applicable to all public services. See 27 HARV. L. REV. 178. The difference, however, between the standard of the utmost care and the standard of reasonable care under the circumstances, with due emphasis laid upon the importance of the circumstances, seems more rhetorical than actual, even in public service. *Gardner v. Boston Elevated Ry. Co.*, 204 Mass. 213, 90 N. E. 534.

TORTS — INTERFERENCE WITH BUSINESS — DAMAGE TO BUSINESS REPUTATION BY WRONGFUL ACT. — The defendants, falsely representing themselves to be the husbands of the two females who accompanied them, obtained rooms in the plaintiffs' hotel for immoral purposes, and conducted themselves in an obscene and disorderly manner, to the disturbance of the other guests. The plaintiffs sue for loss of patronage consequent upon the defendants' acts. *Held*, that a demurrer to the plaintiffs' declaration be overruled. *Hall v. Galoway*, 135 Pac. 478 (Wash.).

The reasoning upon which the court upholds the declaration is that the facts stated amount to a private nuisance. *Sullivan v. Waterman*, 39 Atl. 243, 20 R. I. 273. But it is not necessary to bring this wrong under the vague definition of a private nuisance in order to grant recovery. Relief should be afforded on general principles of tort liability. As a part of good will, the right to business reputation has been recognized as a valuable property right. *Boon v. Moss*, 70 N. Y. 465. Business reputation is carefully protected from injury caused by false spoken or written words. *Ostrom v. Calkins*, 5 Wend. (N. Y.) 263; *Ohio & Mississippi Ry. Co. v. Press Publishing Co.*, 48 Fed. 206. Equity will enjoin the infringement of it by the wrongful use of an established trade name. *Millington v. Fox*, 3 Myl. & Cr. 338. The enjoyment of this right has also been protected by an injunction against imitating, in other respects, the plaintiff's manner of doing business, as by the use of similar uniforms for servants. *Stone v. Carlan*, 3 Code Rep. (N. Y.) 360. In the principal case the defendants have violated this right by intentionally engaging in conduct, the

natural consequences of which were to cause damage to the plaintiffs' business reputation, and there is obviously no justification. All the essential elements of tort liability are present, therefore, although it is difficult to bring the action within any existing classification. *Rice v. Coolidge*, 121 Mass. 393.

**TORTS — LIABILITY OF A MAKER OR VENDOR OF A CHATTEL TO THIRD PERSONS INJURED BY ITS USE — NATURE AND GROUNDS OF LIABILITY —** The defendant negligently allowed some poisonous matter to get into some meat which it was canning. The plaintiff bought some of this meat from a third party relying on the defendant's representations as to the purity of its products. Because the plaintiff served this bad meat to a customer his trade was injured. A demurrer to a declaration alleging these facts was sustained by the lower court. *Held*, that such ruling is error, as there was an implied warranty to all subvendees that the goods were fit. *Mazetti v. Armour & Co.*, 135 Pac. 633 (Wash.).

It is well settled that a warranty only runs to the warrantor's immediate vendee. *Prater v. Campbell*, 110 Ky. 23, 60 S. W. 918; *Post v. Burnham*, 83 Fed. 79; but see *Childs v. O'Donnell*, 84 Mich. 533, 538, 47 N. W. 1108, 1109. This strict rule as to warranties has doubtless influenced courts that have held that a vendor should not be liable in tort in cases where there is no privity of contract between the parties. The latter conclusion is clearly unsound. But courts should not go to the other extreme and hold manufacturers absolutely liable to all persons for injuries from their products. The defendant in the principal case would be liable for negligence, indeed, on principle and by the weight of authority. *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314; *Ketterer v. Armour & Co.*, 200 Fed. 322. *Contra*, *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288. Furthermore, there is a liability imposed in many states on one who makes an honest misrepresentation, in favor of one who justifiably has relied thereon, provided the former had better means of knowledge as to the truth of the statements than the party injured. *Goodale v. Middaugh*, 8 Colo. App. 223; *Kellogg v. Holm*, 82 Minn. 416, 85 N. W. 159. *Contra*, *Sims v. Eiland*, 57 Miss. 83. See 24 HARV. L. REV. 415, 427 *et seq.* Generally, in cases similar to the principal case, it would be difficult to prove actual reliance on express statements, such as advertisements. But as the plaintiff has alleged such reliance it would seem that on demurrer he could recover for the damage resulting therefrom. *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118. *Cf.* *Roberts v. Anheuser-Busch Brewing Ass'n*, 211 Mass. 449, 98 N. E. 95.

**TRIAL — PROVINCE OF COURT AND JURY — RIGHT OF APPELLATE COURTS TO DIRECT A JUDGMENT NOTWITHSTANDING VERDICT. —** The defendant at the trial of the present action requested a directed verdict which, upon the evidence presented, should have been given. The request was refused, however, and the jury found a verdict for the plaintiff. A Massachusetts statute provides that the Supreme Court under such circumstances may direct the entry of a judgment for the party in whose favor a verdict should have been directed below. The defendant, excepting to the ruling of the lower court, requested that this be done. *Held*, that the court will direct that judgment be entered for the defendant. *Bothwell v. Boston Elevated Ry. Co.*, 102 N. E. 665 (Mass.).

The United States Supreme Court recently denied the right to direct the entry of a similar judgment on the ground that the plaintiff's constitutional right to trial by jury required a new trial. *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364, 33 Sup. Ct. 523. See article on this question by J. S. Thordike in 26 HARV. L. REV. 732. The practical inconvenience of such a decision is obvious. The parties must undergo the annoyance and expense of a new trial though the evidence warrants only a directed verdict, and though the



plaintiff has had his day in court and has failed to produce sufficient evidence to raise a jury question. The principal case, then, seems clearly correct. *Hay v. City of Baraboo*, 127 Wis. 1, 105 N. W. 654.

TRUSTS — RESULTING TRUST — CONVEYANCE TO HUSBAND FOR CONSIDERATION FURNISHED BY WIFE. — A husband purchased land with money advanced by his wife for that purpose from her separate estate, taking title in himself. There appears to have been no agreement as to which should have title, nor does it appear that the wife knew that title was held by the husband until several years afterward, when he deserted her, and she filed her bill to have a trust declared. *Held*, a trust will be enforced. *Orr v. Orr*, 70 Legal Int. 684 (Pa. C. P., Delaware Co., Oct. 1913).

Where land is conveyed to A. upon consideration furnished by B., a stranger, a trust is presumed to result in favor of B. *Ex parte Vernon*, 2 P. Wms. 549. However, where A. is B.'s wife, for whom it is his duty to provide, the consideration furnished is presumed to be an advancement. *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 1; *Dunbar v. Dunbar*, [1909] 2 Ch. 639. The same presumption applies in Pennsylvania when the person furnishing the consideration is the wife. *McCormick v. Cook*, 199 Pa. 631, 49 Atl. 238. Upon this presumption the result of the principal case is perhaps open to criticism, for the evidence relied on to rebut it is purely negative. By weight of authority, however, consideration furnished by a wife for a conveyance to her husband gives rise to the same presumption of a resulting trust as in the case of strangers. *Martin v. Remington*, 100 Wis. 540, 76 N. W. 614; *Matador Land & Cattle Co. v. Cooper*, 39 Tex. Civ. App. 99, 87 S. W. 235. It is submitted that the latter view is correct, for in the absence of a duty to provide, the reason for presuming a gift fails. Moreover, the ascendancy which the marital relation gives to the husband renders such protection peculiarly necessary to the wife. For a criticism of these presumptions with regard to resulting trusts and a discussion of the effect of statutes relating thereto, see article by James Barr Ames, 20 HARV. L. REV. 555-557.

## BOOK REVIEWS.

A TREATISE ON THE LAW OF PUBLIC UTILITIES. By Oscar L. Pond. Indianapolis: The Bobbs-Merrill Company. 1913. pp. liv, 954.

In this treatise on the special law of municipal utilities the author undertakes the ambitious task of ascertaining the nature of the municipal corporation as expressed in the law and in the construction which the courts have given to the powers conferred upon the municipality by the state, and also of discovering what limitations are placed on municipal activity by our constitutions as construed by the courts. He broadens the inquiry to discover how far the judicial construction of the law with regard to the taxation and sale of municipal public utilities facilitates or impedes the cities in the discharge of these new duties imposed by the ownership and operation or the proper regulation and control of municipal public utilities. And he enters into the discussion of what are the most efficient methods of regulation and control available to the state or municipality over the operation by private capital of municipal public utilities. Indeed, he shows throughout that he appreciates that unless the strict regulation by governmental authorities which we are trying out proves effectual, we shall be driven perforce to a further extension of governmental control to the point of municipal ownership, already reached in many communities.

The result of modern conditions and of the inventions of our era which have constantly tended to bring about a further development of common service for the whole community has been the general establishment of great corporations which have had granted to them if not legal monopoly at least some special legal privileges. Indeed, we doubtless would have had these local monopolies as a result of the circumstances surrounding the supplying of these public necessities whether any special privileges were granted or not. These public service companies are certainly the most considerable factor in modern commercial affairs. The positive law of the public calling is the only protection that the public have in a situation such as this, where there is no competition among the sellers to operate in its favor. So much has our law been permeated with the theory of *laissez faire*, that the admission has been made with much hesitation that governmental control is ever necessary. But the modern conclusion, after some bitter experience, is that private control can be allowed where the conditions are those of virtual monopoly, only subject to strict regulation by the public authorities. We are now ready to go any length that is necessary to meet this situation. And the law which we are working out for the proper conduct of these utilities will be as useful in holding the public authorities themselves to a proper standard, as it is proving itself to be in keeping the private corporations engaged in public service up to the higher mark we are setting to-day.

As the problems of our modern civilization are most acute in the complex conditions which are to be found in our cities, this necessity for the extension of the sphere of governmental activity has naturally assumed the form of a demand for the municipal ownership and operation, or the adequate regulation and control, of what have come to be known as municipal public utilities.

The author is fundamentally in the right in assuming that the general law of public service applies equally well whether the community service is left in private hands or taken over by the governmental authorities. In fact the public authorities need expert regulation almost as much as the private managements, and the same method should be employed in the regulation of both. We should have a state commission duly empowered to deal with the municipal corporations in the conduct of their utilities along with the private corporations rendering the same service in other communities. This has not been seen clearly as yet, the city authorities very generally demanding the right to decide what is best for their people. But here as in other instances of uncontrolled management, there is a tendency to ignore just claims where there are conflicting interests, such as the respective rights of taxpayers and rate-payers. And public officials no less than private managers need the expert guidance of regulating bodies having a broader view than their own. It is well, therefore, to have such a book as this establishing by statements directly transposed from the comparatively few existing decisions, the essential unity of the law governing public utilities, whatever form that service may take without regard to the character of the organization rendering it. B. W.

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THE RATIONALE OF PUNISHMENT. By Heinrich Oppenheimer. London: University of London Press. 1913. pp. vi, 327.

Not the least important aspect of conservation is the conservation of social institutions. On of the oldest of social institutions is punishment of crime. But many are arguing that the punishment of crime by the state is a relic of barbarism which should be eliminated in the society of to-day. For instance, an eminent member of the medical profession has told us recently that "The



whole problem is really a very simple one after all. It has been made needlessly complex and confusing because of the unconscious and hidden motives of the clans — *i. e.*, the legal and political clans. The formula of this latent content is, make a lot of fuss, kick up a terrible lot of dirt, call experts all kinds of bad names, frighten the people with all this hullabaloo, and in the meantime the unnecessary machinery created to take care of the artificially constructed panic will keep a vast amount of political patronage busy and idle at the same time; at the expense of the innocent, who believes himself in need of protection from a purely fictitious danger." In contrast with this offhand rejection of the whole matter of penal treatment as a means of protecting society, Dr. Oppenheimer has studied the theory of punishment with a view of determining its value as a social institution and of conserving it. At the outset he tells us that "the more extravagant claims of the criminological school threaten to subvert the very foundations of the rampart which society has laboriously erected against the onslaughts of crime." He suggests that there is danger "that the accumulated wisdom of thousands of years may be sacrificed, in a few years of revolutionary experiments, on the altar of a fashionable and self-complacent, withal utterly unverified, hypothesis."

The book is divided into two parts, the one dealing with the origin of punishment, the other with the philosophy of punishment. As a result of the historical inquiry and the exposition and critique of philosophical theories he comes to a conclusion with which probably every lawyer will agree: "that though punishment cannot be regarded as a panacea for crime it is a valuable means of social hygiene in the struggle against that disease of the body politic. Such efficacy as it possesses flows in the main from its character as an agent of prevention; and it discharges the functions of this office in two different ways: by appealing to the fears of persons likely to commit crimes and by operating upon the habitual sentiments of the citizens in general." (295) It ought not to be necessary to write so learned a book to justify such a conclusion. But the quotation at the outset, and much more of the same sort might be adduced, shows that there are many who believe that some single one of our modern inventions for the non-legal administrative treatment of offenders may be made to do the whole work.

An excellent bibliography, covering some ten pages, will make the book useful to the student. Unhappily there is no index.

R. P.

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A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE. By A. Esmein. (Being Vol. V of the Continental Legal History Series, published under the auspices of the Association of American Law Schools.) Boston: Little, Brown, and Company. 1913. pp. xlv, 640.

The translation of this work of Professor Adheimer Esmein, the foremost legal scholar of France if not of the world, places the legal profession under the greatest obligation to the editors of this series. At a time when the law's delays are justly claiming our attention, and when ignorance of the historical development of law is leading to many a foolish suggestion of reform, it is well for us all to read, in the graphic words of this master, the history of a well-considered attempt to simplify and hasten procedure. It may teach us, at least, to avoid the evils of lodging too great power in the hands of the administrative department.

M. Esmein's great work was written a generation ago, at the very beginning of his career. For this translation, he has entirely revised his earlier work, and has rewritten that portion which describes the parallel course of English criminal procedure in the light of the later work of Pollock and Maitland, Thayer,

and Holdsworth. In its later as in its earlier form this is a masterly work, and every American lawyer, and every law reformer too, should read it.

Besides Esmein's "*Histoire de la procédure criminelle en France*," this volume contains also chapters from Professor Garraud's "*Traité théorique et pratique d'instruction criminelle*" and from Mittermaier's "*deutsche Strafverfahren*." This fact we learn, not from the title-page, but from the editorial preface and from a footnote at the beginning of each extract. Perhaps this is justifiable in a book of this sort, even at the risk that careless readers will ascribe to Esmein statements for which he is in no way responsible. The careful reader can easily distinguish the author he is at the moment reading from the length of the footnotes; Mittermaier's being much longer and Professor Garraud's much shorter than Professor Esmein's. The result of this mixture is a fuller treatment of certain portions than were contained in the principal work which is a boon to the American student.

This volume is to be unqualifiedly commended as a standard and sufficient history of continental criminal procedure.

J. H. B.

LEADING CASES IN WORKMEN'S COMPENSATION. By G. N. W. Thomas. London: Butterworth & Co. 1913. pp. xvii, 122, 21.

- This volume contains condensed reports of thirty-four cases in the House of Lords and twenty-two cases in the Court of Appeal. The cases are arranged according to subjects. As the provisions of the British act are in many respects similar to those in the various statutes recently adopted in many of our states, it is not strange that the subjects should have a familiar sound. "What is accident?" "Did the accident arise out of and in the course of the employment?" "Misconduct of the workman." "Injury due to 'horse-play.'" "Dependency." "Is the unemployment due to the injury or to the state of the labour market?" These are a few of the topics covered; and the recital of them is enough to indicate that the volume should not be neglected by American practitioners. There are ample references to the places where the cases are reported in full.

THE INDIAN CONTRACT ACT. By Sir Frederick Pollock, assisted by Dinshah Fardunji Mulla. Third Edition. London: Sweet and Maxwell, Limited. 1913. pp. lxii, 765.

It is four years since the second edition of this book appeared, and the changes in the present edition are not numerous. We take pleasure, however, in again commending the book. There is a large amount of valuable comment on the English law of contracts, sales, and agency contained in it, besides the authorities from the Indian Reports.

S. W.

A TREATISE ON THE LAW OF CORPORATIONS. Volume V. By William W. Cook. Seventh Edition. Boston: Little, Brown, and Company. 1913. pp. vii, 953.

THE PANAMA CANAL CONTROVERSY. By Sir H. Erle Richards. Oxford: The Clarendon Press. 1913. pp. 48.

AMERICAN ADVOCACY. By Alexander H. Robbins. Second Edition. St. Louis: Central Law Journal Company. 1913. pp. xvi, 336.



THE CONTEST AGAINST CRIMINALITY. By Harald Salomon. Stockholm: Royal Printing Office, P. A. Norstedt & Söner. 1913. pp. 24.

THE CREDIT SYSTEM. By W. G. Langworthy Taylor. New York: The Macmillan Company. 1913. pp. x, 417.

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## THE POLICE POWER, A PRODUCT OF THE RULE OF REASON.

A WELL-KNOWN writer on the police power calls it "The law of overruling necessity,"<sup>1</sup> and he adds:

"The law of necessity has been stated to be an exception to all human ordinances and constitutions, yet has been frequently decided to be subject to the law of reason, and subject to the control of the courts."

It would be more accurate to say that the entire doctrine of the police power of the states is the creation of the courts, evolved from the necessity of harmonizing provisions of written constitutions of states and nation with the imperative needs of civilized society. It is the result of the application of the "rule of reason" in the construction of written constitutions. For the absence of exact definitions of such words as "to deprive," "liberty," "property," "due process of law," "equal protection of the laws," "privileges and immunities," and the like, in constitutions,<sup>2</sup> left room for but one conclusion, to paraphrase the language of the Chief Justice in the *Standard Oil Case*,<sup>3</sup> which is, that it was expressly designed not to unduly limit or extend the application of the constitution by precise definition, but, while fixing a standard, that is, by declaring the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the

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<sup>1</sup> W. P. Prentice, *The Police Power*, p. 6.

<sup>2</sup> See Francis J. Swayze on the Fourteenth Amendment, 26 HARV. L. REV. 1.

<sup>3</sup> *Standard Oil Co. v. United States*, 221 U. S. 1, 63.



light of reason, guided by the principles of law, and the duty to apply and enforce the public policy embodied in the constitution in every given case, whether any particular act of a legislative body was, within the contemplation of the constitution, permitted or forbidden. That is to say, the rule of construction, to be applied to constitutions as well as to statutes, must be the spirit and intent of the people or their representatives, and therefore the prohibition of a constitution must be held to extend to acts "even if not within the literal terms" of the constitution, "if they are within its spirit, because done with an intent to bring about the harmful results which it was the purpose of the" constitution to prohibit.<sup>4</sup> And on the other hand, that such prohibition must not be held to extend to acts which, while within the literal terms of a constitutional prohibition, could not have been intended by the people to be prohibited to legislative competence, because of the obvious injury to public interests which would result from such prohibition.

The inhabitants of the thirteen original states of our federal union, with common accord, embodied their conceptions of proper governmental organization in written constitutions, carefully devised to insure the expression and limitations of the powers of government, and the distribution of those powers among three distinct, although coördinated, branches. "The theory of our government, state and nation, is opposed to the deposit of unlimited power anywhere."<sup>5</sup>

In almost every one of these constitutions there was embodied a bill of rights — an enumeration of the rights which the people intended to secure to every individual of the community, for his protection in his life, his liberty, his right to labor in his own way, and the protection of the property which should be the fruit of his labor. These provisions, more or less detailed in the constitutions of the different states, were designed to restrict and control the activities of the legislative and executive branches of the government, and thus to secure the blessings of civil liberty to the people of those states and their posterity.

"Civil liberty," said Judge Sharswood, "the great end of all human society and government, is that state in which each in-

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<sup>4</sup> *United States v. American Tobacco Co.*, 221 U. S. 106, 177.

<sup>5</sup> *Loan Association v. Topeka*, 20 Wall. (U. S.) 655.

dividual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained except by equal, just, and impartial laws."<sup>6</sup>

The constitution of Massachusetts expresses in perhaps greater detail than any other those provisions by which the solicitude of its framers intended to accomplish the great ends they had in view. The preamble recited the duty of the people in framing a constitution of government to be

"To provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them, that every man may at all times find his security in them."

In the first part of the constitution there was set forth in great detail the rights of the people collectively, and of the citizens individually. "Each individual of society," it was declared, "has a right to be protected by it in the enjoyment of life, liberty, and property according to standing laws." And every one "ought to find a certain remedy by having recourse to the laws for all injuries or wrongs which he may receive in his person, property, or character" (paragraphs X, XI).

It was also declared, in the familiar language derived from Magna Charta, that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

Finally, it was declared to be "essential to a preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws and administration of justice" (paragraphs XII, XXIX).

The fact that the Constitution of the United States, as originally framed, contained no bill of rights, was the subject of serious complaint, and the first Congress, on September 25, 1789, adopted and proposed to the legislatures of the several states ten amendments, which were ratified between that date and December 15, 1791. These amendments embodied, as restrictions upon the action of the federal government, many of the provisions familiar to all

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<sup>6</sup> 1 Sharswood's Blackstone, 127, note 8.



the state constitutions, imposing restraints upon action of the state governments.

It seems incredible that any intelligent student of government should have questioned the power and duty devolved upon the judiciary by these constitutions to inquire, when a question arose in a case coming before the courts, whether or not an act of the legislature, or of the Congress, violated some express provision of fundamental law. Not only was such a duty the necessary result of the establishment of constitutions purporting to regulate or circumscribe legislative action, and granting to the courts exclusive judicial power, but the constitutions of four of the New England states contained express provisions authorizing the legislature, or the governor, for their guidance in keeping within the constitutional bounds applicable to their respective functions, to require the opinions of the justices of the highest court of the state upon important questions of law, and upon solemn occasions.<sup>7</sup>

No such provision, however, being found in the Constitution of the United States, the justices of the Supreme Court from the very beginning declined to answer questions at the request of the executive, holding that the exercise of judicial power required them merely to decide questions or controversies coming before them in the course of the ordinary administration of justice.<sup>8</sup> But the court also held that when such questions arose in such cases or controversies, they would not hesitate to measure a law invoked in support of any given act with the constitution of the state or nation from which the power to legislate was derived, or by which it was qualified or restrained, and to declare it to be invalid if it exceeded the limits expressed in such grant or regulation.<sup>9</sup>

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<sup>7</sup> See Const. of Mass., 1780, ch. 3, art. 2; Const. of Maine, 1819, art. 6; Const. of New Hampshire, 1902, art. 73; Const. of Rhode Island, 1842, art. 10.

Similar provisions were embodied in the Const. of South Dakota, 1889, art. 5, § 13, and that of Missouri prior to 1875 contained a like provision. See note to 1 Thayer's *Cases on Const. Law*, p. 175.

By the Supreme Court Act (1875) of Canada, as amended by 54 & 55 Vict., ch. 25, the Governor-General in Council, and in some cases the Senate or the House of Representatives of the Dominion Parliament, are empowered to call upon the justices of the Supreme Court for opinions on questions of law.

<sup>8</sup> Marshall's *Life of Washington*, vol. v, 441; Sparks's *Life of Washington*, vol. x, 359.

<sup>9</sup> *Marbury v. Madison*, 1 Cranch (U. S.) 137, 177.

The opinion of Chief Justice Marshall in *Marbury v. Madison*, the case referred to, for a century has been followed by the Supreme Court. Its reasoning has never been answered. The courts of the states and of the nation have uniformly recognized and discharged the duty of passing upon the constitutionality of acts of state or national legislatures respectively, when they arose in cases coming before them. In no other way could the mandates of constitutions have been made effective; in no other way, certainly, could the supremacy of the federal Constitution have been maintained — a supremacy which was declared in the language of the Sixth Article:

“This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”

The existence of this power and duty was universally accepted<sup>10</sup> despite the partisan outbreak of Mr. Jefferson after the decision in *Chisholm v. Georgia* in 1793, and by Andrew Jackson a quarter of a century later, until very recent times, when, for similar reasons, — namely, because the construction put upon constitutional provisions by the courts offended a radical faction of the community, — a renewed and even more violent assault was made upon the exercise of this judicial power.

With great subtlety, but with singular inaccuracy, the most conspicuous leader of this attack has characterized the action of the judiciary in holding state statutes unconstitutional, to be the performance, not of the ordinary judicial function, but of “the function which no other judge in the world performs of declaring whether or not the people have the right to make laws for themselves on matters which they deem of vital concern.”<sup>11</sup>

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<sup>10</sup> Mr. C. A. Beard, in an article entitled “The Supreme Court, Usurper or Grantee,” in the *Political Science Quarterly*, for March, 1912, p. 1, has amply demonstrated the fact that all of the framers of the federal Constitution whose views on the subject are recorded recognized that the necessary effect of its provisions would be to empower the judiciary to declare void any acts of Congress or of state legislatures which would violate the limitations imposed by the Constitution.

<sup>11</sup> “Judges and Progress,” by Theodore Roosevelt, *The Outlook*, Jan. 6, 1912.



The statement is wide of the fact. In nearly every one, if not all, of the English colonies whose governments are embodied in written constitutions by which a separation is effected between the executive, legislative, and judicial functions, the courts of the colonies exercise power to pass upon the constitutionality of acts of the legislature, and their decisions are, under certain conditions, subject to review by the Judicial Committee of the Privy Council in England.

Thus, in *Buckley v. Edwards*, L. R. [1892] A. C. 387, the Privy Council held an act of the legislature of New Zealand to be invalid because unauthorized by the constitution of that colony.

In *Webb v. Outrim*, [1907] App. Cases, 81, on appeal to the Privy Council from a decision of the Supreme Court of Victoria, the powers of that colony under the constitution of the Commonwealth of Australia were considered, and it was held that the Parliament of the Commonwealth had no power to take away from the colony the right to appeal to the King in Council existing in that case; and the power of the colony, under the constitution to impose an income tax, even on the salary of an officer of the Commonwealth, was considered and determined.

Very recently the Privy Council in England, on appeal from the Supreme Court of Canada from opinions given by it in answer to questions submitted by the Governor-General in Council concerning the power of the Dominion to enact a law relating to solemnization of matrimony, gave authoritative construction to certain sections of the constitution of the Dominion of Canada (The British North America Act, 1867, secs. 91 and 92), and defined the limits of Dominion control over provincial legislation on the subject of marriage.<sup>12</sup>

The same power is constantly exercised by the Supreme Court of Canada<sup>13</sup> and by the High Court of Australia.<sup>14</sup>

Mr. Herbert Pope, in a recent article,<sup>15</sup> explains, in an able review of its Parliamentary history, why in England no court exer-

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<sup>12</sup> See L. R. App. Cases, [1912] p. 880.

<sup>13</sup> Todd's Parliamentary Government in the Colonies, pp. 220, 363-366.

<sup>14</sup> See *Huddart Parker & Co. v. Moorehead*, 8 Comw. L. R. 330; *The King v. Commissioners*, id. p. 419.

See also Moore's Constitution of the Commonwealth, 2 ed., pt. 6, ch. 1.

<sup>15</sup> 27 HARV. L. REV. 45.

cises the power to declare an act of Parliament unconstitutional, by showing that not merely is there no written constitution of Great Britain, but that Parliament itself has always exercised judicial powers, and has been and continues to be the highest court of the realm. But under the American state and federal constitutions the legislature possesses no judicial powers, and as Mr. Pope says, "The meaning of the constitution *as law* could be determined only by the judgment of some court, and Congress, under the Constitution, is not a court."

In the construction of constitutional provisions made for the protection of individuals the courts early recognized what Mr. Justice Holmes so well expressed in a comparatively recent case, that —

"In modern societies every part is related so organically to every other that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that in the working of a statute there is some tendency logically discernible to interfere with commerce or existing contracts. Practical lines have to be drawn and distinctions of degree must be made."<sup>16</sup>

In the year 1835, Chancellor Walworth, in deciding a case in the New York Court of Chancery, said:

"But in a state which is governed by a written constitution like ours, if the legislature should so far forget its duty, and the natural rights of an individual, as to take his private property and transfer it to another, where there was no foundation for a pretense that the public was to be benefited thereby, I should not hesitate to declare that such an abuse of the right of eminent domain was an infringement of the spirit of the constitution; and therefore not within the general powers delegated by the people to the legislature.

"But while I deny to the legislative power the right thus to take private property for the mere purpose of transmitting it to another, I admit that the two branches of the legislature, subject only to the qualified veto of the executive, are the sole judges as to the expediency of making police regulations interfering with the natural rights of our citizens, which regulations are not prohibited by the constitution."<sup>17</sup>

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<sup>16</sup> *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 616.

<sup>17</sup> *Varick v. Smith*, 5 Paige's Chancery, 136, 159.



In the great case of *Commonwealth v. Alger*, 7 Cush. (Mass.) 53, Chief Justice Shaw, with that masterful grasp on principles of law and government that always characterized him, analyzed and expounded the relation between constitutional provisions, adopted for the preservation of individual rights, and the powers of government by which those rights must be qualified, in order that, without impairment of the substantial and essential rights of the individual in a free state, government may nevertheless go forward and discharge its necessary functions for the benefit of society at large — the commonwealth.

"We think it is a settled principle," he said, "growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

"This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."

He added:

"It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious, that all well-regulated minds will regard it as reasonable." . . . (Pp. 84-86.)

The limits of the case under consideration did not lead the Chief Justice to a discussion of the many other cases where the fitness of the exercise of such power is not so obvious that its reasonableness would be agreed to by "all well-regulated minds."

In the year 1837 the same principle was recognized by the Supreme Court of the United States, in a case involving the constitutionality of a state statute requiring the master of every vessel bringing immigrants from any other country, to report to the authorities of the state in which the port of arrival was situated certain facts concerning such immigrants. It was claimed that this statute amounted to a regulation of foreign commerce, and therefore was invalid, because in conflict with the power over that subject conferred upon Congress by the federal Constitution. In holding that it did not so conflict, the court, by Justice Barbour, affirmed —

"That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty, of a state to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive." <sup>18</sup>

In *Prigg v. Commonwealth*, 16 Peters (U. S.) 539, in holding unconstitutional and void an act of the legislature of Pennsylvania, purporting to punish as a public offense against the state the act of seizing and removing a slave by his master, which the court held the Constitution of the United States was designed to justify and uphold, Mr. Justice Story said:

"To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood in

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<sup>18</sup> *City of New York v. Miln*, 11 Peters (U. S.) 102, 139.



any manner whatsoever to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the states, and has never been conceded to the United States. It is wholly distinguishable from the right and duty secured by the provision now under consideration, which is exclusively derived from and secured by the Constitution of the United States, and owes its whole efficacy thereto. We entertain no doubt whatsoever that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers. The rights of the owners of fugitive slaves are in no just sense interfered with or regulated by such a course; and in many cases the operations of this police power, although designed generally for other purposes, for the protection, safety, and peace of the state, may essentially promote and aid the interests of the owners. But such regulations can never be permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States, or with the remedies prescribed by Congress to aid and enforce the same." (P. 625.)

In giving scope to the exercise of this so-called police power the Supreme Judicial Court of Massachusetts has been, perhaps, more scrupulously regardful of the limitations upon its exercise imposed by constitutional restrictions than the courts of any other state. Chief Justice Knowlton, in the case of *Commonwealth v. Strauss*, 191 Mass. 545, 550, defined this power as including "the right to legislate in the interest of the public health, the public safety, and the public morals. If the power is to be held within the limits of the field thus defined," he said, "the words should be interpreted broadly and liberally. If we are to include in the definition, as many judges have done, the right to legislate for the public welfare, this term should be defined with some strictness so as not to include everything that might be enacted on grounds of mere expediency."

The legislature of Massachusetts has also exhibited a commendable desire to restrain its action within the boundaries of constitutional power, by frequently requesting the opinions of the justices of the Supreme Court as to the constitutionality of measures proposed to be justified under the exercise of the police power, and

in every instance, so far as the writer has been able to ascertain, the legislature has acquiesced in the expression of opinion thus invoked.<sup>19</sup>

The adoption of the Thirteenth and Fourteenth Amendments to the United States Constitution, particularly the provision forbidding states to make laws which shall abridge the privileges or immunities of citizens of the United States, deprive any person of life, liberty, or property without due process of law, or deny to any person within the jurisdiction the equal protection of the laws, forced upon the Supreme Court of the United States a more careful and comprehensive consideration of the limits of the police power than previously had been incumbent upon that tribunal. In a line of cases, too well known to require or justify enumeration here, the Supreme Court has analyzed and discussed the extent to which constitutional prohibitions or fundamental principles are and must be modified by that uncertain reserve power in the states known as the police power. It should be remembered that the whole doctrine of the police power is of judicial origin; that no provision in the Constitution of the United States, nor, so far as the researches of the present writer have shown, in that of any state, expressly limits or qualifies the declaration of the rights which they purport to secure to individuals, by the further declaration that any law which the legislature may choose to enact for the avowed purpose of protecting public health, public safety, or public morals, or of providing for the general public welfare, shall be valid, notwithstanding any effect which such law may have upon the rights guaranteed by the Constitution.

There are in many of the modern State constitutions provisions expressly subordinating all corporations to the police power. Such provisions are generally expressed in such language as the following—

“The police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State.”<sup>20</sup> Such provisions, obviously, are intended, not to weaken, but to strengthen provisions in the Bills of Rights in behalf of individuals.

<sup>19</sup> See 200 Mass. 619, 622; 211 Mass. 605; 207 Mass. 601; *id.* 606; 211 Mass. 618.

<sup>20</sup> See constitutions of Pennsylvania (1873), North Dakota (1889), Montana (1889),



The wisdom and the necessity of the creation of some such doctrine as that of the police power may well be recognized; but in that recognition credit also should be given to the sagacity of the judges who first perceived the impossibility of carrying on government without some such lubricant, and who therefore formulated and applied the theory of the police power.

Criticism of the failure of the judiciary to extend this principle in some instances to particular cases of novel and experimental legislation for social betterment should be silenced by a recognition of the far-seeing statesmanship which first led courts by the application of "the rule of reason" to enunciate the doctrine of the police power and the necessity of so applying it as not to override express constitutional provisions.

In the *Slaughter-House Cases*, 16 Wall. (U. S.) 36, in which the doctrine first received extensive consideration by the Supreme Court after the adoption of the Fourteenth Amendment, Mr. Justice Field, in his dissenting opinion, said:

"With this power of the state and its legitimate exercise I shall not differ from the majority of the court. But under the pretense of prescribing the police regulation the state cannot be permitted to encroach upon any of the just rights of the citizens, which the Constitution intended to secure against abridgment." (P. 87.)

No student of the history of the legislation enacted, and that sought to be justified under this power, can fail to recognize that the apprehension suggested in this statement has been realized, and that the rights intended to be secured to citizens under state and federal constitutions have been and are being continually encroached upon in the interests of what is vaguely known as "the public welfare."

If the views suggested by Mr. Justice Holmes, in dissenting from the majority opinion in *Lochner v. New York*,<sup>21</sup> should prevail, and courts be held to have "nothing to do with the right of a majority to embody their opinions in law," written constitutions

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Mississippi (1890), Kentucky (1890), Virginia (1902), South Dakota (1898), Louisiana (1898), Idaho (1889). The constitutions of Wyoming (1889) and New Mexico (1911) contain a clause, "The police power of the state is supreme over all corporations as well as individuals." (Thorpe's constitutions.)

<sup>21</sup> 198 U. S. 45, 75.

had better be avowedly and formally abolished, as bills of rights would then become mere mockeries.

But such views have not always prevailed, although they certainly have affected the modern tendency of decision in the Supreme Court.

Professor Freund <sup>22</sup> defines the term "police power" "as meaning the power of promoting the public welfare by restraining and regulating the use of liberty and property."

Professor Tiedeman, in the preface to his treatise on "State and Federal Control of Persons and Property in the United States," says that the police power is properly confined to the detailed enforcement of the legal maxim *sic utere tuo ut alienum non lædas*, and he quotes, with approval, a passage from an opinion of Judge Henshaw in the Supreme Court of California, in which that judge says that while the police power is one whose proper use makes most potently for good,

"In its undefined scope and inordinate exercise lurks no small danger to the republic; for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws none the less dangerous because well meant."<sup>23</sup>

In *Bartemeyer v. Iowa*, <sup>24</sup> Mr. Justice Field, who had dissented from the decision of the court in the Slaughter-House Cases, in an opinion concurring with the majority, stated the position of the judges who had dissented in those cases to be, not that they contended that the Fourteenth Amendment *interfered* in any respect with the police power of the state or was adopted for any such purpose; but that under the pretense of prescribing a police regulation the state could not be permitted to encroach upon any of the just rights of the citizens which the Constitution intended to guard against abridgment; and because in their opinion the act of Louisiana under consideration in the Slaughter-House Cases went far beyond the province of a police regulation and created an oppressive and odious monopoly they regarded it as unconstitutional.

In almost every case in which the constitutionality of legisla-

<sup>22</sup> Freund, The Police Power, Preface.

<sup>23</sup> 112 Cal. 468, 473.

<sup>24</sup> 18 Wall. (U. S.) 120.



tion sought to be held under the police power has been considered by the Supreme Court, the court has taken pains to declare that a state cannot, under the pretense of the exercise of the police power, encroach upon the powers of the general government or rights granted or secured by the supreme law of the land.<sup>25</sup>

But, as Mr. Justice Holmes said in *Otis v. Parker* <sup>26</sup> —

“General propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree.”

In the case of *Holden v. Hardy* <sup>27</sup> the court, in discussing the question whether or not a state law violated the due process clause of the Fourteenth Amendment, referred to many local reforms which had been enacted in the states, saying that they were mentioned only for the purpose of calling attention to a probability that other changes of no less importance might be made in the future,

“and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.” (P. 387.)

This case perhaps was the first one to suggest that the doctrine of expediency should control the judgment of the court in measuring state enactments with constitutional requirements. The premise upon which it was based has been proved untenable by a recent demonstration, in the adoption of two constitutional amendments within a short time of their proposal, that the Constitution of the United States may be easily amended *when a substantial majority of the people desire it to be done*.

In an earlier case, the Supreme Court repudiated the proposition that a state, in the face of the Fourteenth Amendment, could

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<sup>25</sup> See *Beer Co. v. Mass.*, 97 U. S. 25, 28; *Butchers' Union v. Crescent City Co.*, 111 U. S. 746, 754; *Lochner v. New York*, 198 U. S. 45.

<sup>26</sup> 187 U. S. 606, 608.

<sup>27</sup> 169 U. S. 366.

make due process of law of anything which it chooses to declare as such, saying:

"To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation."<sup>28</sup>

But the *opinion*, if not the actual *decision*, in *Holden v. Hardy* is scarcely consistent with this reservation, and in *Railroad Co. v. Drainage Commissioners*<sup>29</sup> the court, speaking by Mr. Justice Harlan, said (P. 592):

"We hold that the police power of the state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. . . . And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose."

A comprehensive review of the decisions of the Supreme Court respecting state legislation attacked as in violation of provisions of the Constitution of the United States on the one hand, and on the other sought to be upheld under the police power, has been recently made by Mr. Charles Warren in an article in the *Columbia Law Review* for April, 1913, entitled "The Progressiveness of the United States Supreme Court." The writer shows that out of more than 560 cases considered by the court between 1887 and 1901, there were only 30 cases where a state law or action was held unconstitutional, and that of these 30, only 4 were cases sought to be upheld under the general welfare theory. Indeed, the enumeration of the cases in which state action has been upheld, set forth by Mr. Justice Hughes in the opinion of the court in *Railroad Co. v. McGuire*,<sup>30</sup> illustrates the wide scope for the exercise of state legislative effort to improve social conditions which the Supreme Court recognizes; for its only limits, in the direction under discussion, would seem to be that the legislative action must not

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<sup>28</sup> *Davidson v. New Orleans*, 96 U. S. 97.

<sup>29</sup> 200 U. S. 561.

<sup>30</sup> 219 U. S. 549, 569.



be arbitrary, or have no reasonable relation to a purpose which it is competent for government to effect.

This is in harmony with what was said by Mr. Justice Brown in *Lawton v. Steele*,<sup>31</sup> at least so far as that statement goes, viz.:

"The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual, or unnecessary restrictions upon lawful occupations. . . .

"To justify the state in thus interposing its authority on behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, secondly, that the means are reasonably necessary for the accomplishment of the purpose, and are not unduly oppressive upon individuals."

The recognition by the courts of an undefined and undefinable power in the legislature, qualifying the declaration of fundamental individual rights, does indeed impose an arduous duty upon the judiciary in determining when even this wide area of legislation is departed from in the effort to secure utopian conditions through legislation. On the other hand, it opens such a wide and undefined pathway around constitutional restrictions, that nothing but constant vigilance, careful analysis, and inflexible obedience to the spirit and intent of constitutional mandates on the part of the judiciary can prevent the gradual but effective impairment of their force. If the scope attributed to the police power by Mr. Justice Holmes in the *Oklahoma Bank Guaranty Cases*<sup>32</sup> is to prevail, it is hard to see what restrictions upon legislative effort to promote the social welfare still remain, short of the crude appropriation of individual property for private, as distinguished from public, purposes. "It may be said in a general way," runs his opinion in that case, "that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare." Yet that the learned justice recognized that this broad statement requires some qualification is evidenced by his further observation:

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<sup>31</sup> 152 U. S. 133, 137.

<sup>32</sup> *Noble State Bank v. Haskell*, 219 U. S. 104, 112.

"With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. . . . It will serve as a datum on this side, that in our opinion the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line."

In an earlier case<sup>33</sup> the Supreme Court declared that while "the right to exercise the police power is a continuing one . . . yet the exercise of this power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment."

In every case, the courts at all events must inquire<sup>34</sup> "whether the legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for unjust discrimination, or the oppression or spoliation of a particular class."<sup>35</sup>

So far from the Supreme Court being open to fair criticism for giving unduly narrow construction to constitutional provisions in favor of individual rights, as against measures designed for the public welfare, a more candid criticism might suggest that that great tribunal in common with other courts had yielded somewhat unduly to public criticism in giving effect to legislation, which, however desirable from the standpoint of social reform, yet involves a measurable encroachment upon some of those individual rights to secure which the Fourteenth Amendment was adopted.

Modern criticism of courts apparently proceeds upon the theory that constitutional provisions shall be enforced only until a certain number of people who are able to give expression to their views in newspapers, magazines, and on the lecture platform shall contend that some other principles should control legislative action. The theory of the framers of constitutions in the past has been that their provisions were to be more than temporary in duration, and that they should be respected and enforced, until a sufficiently large number of people should disagree with them to bring about a modification of the constitution in the method provided in such instru-

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<sup>33</sup> *Dobbins v. Los Angeles*, 195 U. S. 223-239.

<sup>34</sup> *Holden v. Hardy*, 169 U. S. 366, 398.

<sup>35</sup> See also *Dobbins v. Los Angeles*, *supra*, and cases cited on pp. 236-238.



ment; and that the question whether or not legislative or executive action exceeded constitutional limitations should not be left to the final determination of those acting, but, when arising in the course of litigation, should become a judicial question, to be determined by the courts of justice. This has been the American theory of constitutional government; and it is interesting to note that the same theory was deliberately adopted in one of the newest and, in some respects, the most radical of English federations, — Australia.

In the convention which framed the constitution of the Commonwealth of Australia it was proposed that when any law passed by the Commonwealth Parliament was declared unconstitutional by a decision of the High Court, the executive might, upon the adoption of a resolution by absolute majorities in both houses, or in one house alone, refer the law to the electors for their approval, and, if so approved, that the same should become a law notwithstanding the constitution — in effect Colonel Roosevelt's proposition for the recall of judicial decisions.

But Mr. Moore, in his work on the "Constitution of the Commonwealth," says:

"The proposal received no support, and the maintenance of the individual right to impugn laws is the more significant because in other respects the constitution differs markedly from the Constitution of the United States in not establishing rights of individuals against governmental interference." <sup>36</sup>

The constitution, as adopted, expressly empowered the Parliament, "subject to this constitution," "to make laws for the peace, order, and good government of the Commonwealth, with respect to" certain enumerated subjects, and authorized Parliament to confer original jurisdiction upon the High Court in any matter "arising under this constitution, or involving its interpretation." Not only was the finality of judicial interpretation of constitutional power recognized as incident to the ordinary administration of justice, but it was also provided that under certain conditions the executive or the legislature might require the opinions of the justices of the High Court upon constitutional questions, and it was further declared —

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<sup>36</sup> See Moore's *Constitution of the Commonwealth*, 2 ed., Melbourne, 1910, p. 360.

"No appeal shall be permitted to the Queen in Council from the decision of the High Court upon any question howsoever arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any state or states, or as to the limits *inter se* of the constitutional powers of any two or more states, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council." <sup>37</sup>

It would be well if the exercise of the police power could be limited by the test often enunciated, but not always followed, of reasonableness, as distinguished from arbitrary or capricious action.<sup>38</sup>

But the pressure is very great on the part of social reformers to compel legislation which transcends constitutional restrictions, and seeks justification under the elastic boundaries of the police power, and any interference with their programs by decisions of courts based upon constitutional limitations is received by them with impatience, and provokes them to intemperate attacks on judges and the exercise of the judicial function just described. The leader of the radical movement against the judicial enforcement of constitutional limitations has declared his belief that courts should continue to have the power to declare void unconstitutional legislation, but, he adds, "only provided the power is exercised with the greatest wisdom and self-restraint."<sup>39</sup> If the continued existence of governmental functions were to be dependent upon officials always exercising powers vested in them "with the greatest wisdom and self-restraint," it may be questioned how long government could continue. Certainly there have been times when the executive office under such a test would have had to go into commission. There are infirmities in all human institutions, but government is an exceedingly practical business. The framers of our institutions believed that the welfare of society would suffer if the legislature had unlimited power. When the states became members of a federal union the short experience under the original Articles of Confederation demonstrated

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<sup>37</sup> See Edgerton, *Federations and Unions Within the British Empire*, Oxford, 1911, pp. 58, 66, 212, 214.

<sup>38</sup> State *ex rel.* Davis v. Clausen, 117 Pac. 1101.

See also "Judicial Construction of Fourteenth Amendment," by Francis J. Swayze, 26 HARV. L. REV. 1.

<sup>39</sup> The Outlook, *supra*, Jan. 6, 1912.



the need of a stronger central government, and of some power to prevent either state or national government from encroaching upon the domain assigned to the other. This power was provided in an impartial judicial establishment. Our forefathers had suffered from various kinds of tyranny. They proposed to protect the individual citizen in his life, his liberty, his reputation, and his property, against any form of oppression, and to that end they formulated and embodied in the fundamental law declarations of rights which were to be forever recognized and preserved. The judiciary was made the guardian of those rights. In the discharge of that sacred trust it has sometimes erred; but on the whole it has not allowed the letter to stifle, but has been quickened by the spirit of liberty under law. Mr. Justice Holmes recently said he did not believe the Union would be imperilled if the Supreme Court lost its power to declare an act of Congress void; but he added, "I do think the Union would be imperilled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the commerce clause was meant to end."<sup>40</sup>

Whether the power be taken away directly, or be deadened and atrophied in its action by adverse criticism and demagogic clamor, when the judiciary no longer shall feel at liberty to construe the provisions of the fundamental law "in the light of reason," constitutional government, in the sense in which it has been understood for a century and a half, will be at an end, and the doctrine of the police power will have been swallowed up in the capacious maw of unrestrained democracy.

*George W. Wickersham.*

NEW YORK CITY.

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<sup>40</sup> Speech by Mr. Justice Holmes before the Harvard Law Association, New York, Senate Doc. No. 1106, 62d Cong., 3d session.

## PUBLIC WRONG AND PRIVATE ACTION.

WHEN does the violation of a criminal statute or ordinance make the wrongdoer civilly responsible? On this question the law is in some confusion.<sup>1</sup> Sometimes it is said that the wrongful act is "negligence *per se*"; sometimes that it is only "evidence of negligence"; sometimes again that it is "*prima facie* evidence of negligence."<sup>2</sup> With the bulk and variety of new legislation the question often comes up in one form or another, and it is desirable to recognize as exactly as possible the principles involved.

Much of the confusion in the cases has come from obscurity as to fundamental conceptions of the law of negligence. This is not surprising, for negligence is a modern head of the law, and decisions rendered before it attained its present development, when principles now well established were still imperfectly perceived, naturally make complications. To-day some things can to advantage be reëxamined and restated. And this ought to be done in as plain and straightforward a fashion as possible. Important as it is everywhere in our law that its distinctions follow simple and rational lines, this is particularly true of the law of negligence. In that topic refinement and complexity are least excusable. Owing to its recent development it is little complicated by outgrown rules; and its characteristic feature is the use of broad and general tests in which everything depends on the facts of the case. Within wide limits the jury is given the power to determine the propriety of conduct. The "ordinary prudent man" is a palpable fiction, designed to present to the jury's mind in concrete form the conception of an external as distinguished from a personal standard. What this imaginary person would have done really means what the jury thinks was the proper thing to do;<sup>3</sup> and so long as there is room for a fair difference of

<sup>1</sup> "The general question . . . whether an injury caused by the defendant while violating a statute is actionable *per se* is a troublesome one, open to much argument, and not yet settled by any generally accepted principle." Professor Wigmore, in 6 Ill. Law Rev. 350.

<sup>2</sup> For the authorities, see Jaggard on Torts, § 263.

<sup>3</sup> Arnold, Psychology applied to Legal Evidence, 168; Terry, Leading Principles of Anglo-American Law, § 204.



opinion on this point the jury has a free hand.<sup>4</sup> Here, as so often, the common law has adapted itself to the jury system, using that tribunal as an instrument for solving problems of everyday experience, and at the same time finding a check against arbitrary results in the court's supervisory power to keep the untrained body within the bounds of reason. And in formulating the principles which are to govern the jury's action, the scholar must vigilantly resist the temptation to spin his own web of theory and distinction, pleasing perhaps in ingenuity and symmetry, but too fine for everyday use. In the law of negligence no doctrine is useful or appropriate which cannot be plainly and simply stated, and which, when so stated, does not respond to the test of common sense.

This does not mean that the effort for clear thought and exact statement can be relaxed. Rather the contrary; for the very breadth of the subject has made it easy to hide confusion of thought behind ambiguous and question-begging phrases. "A loose vocabulary" as Professor Gray has said,<sup>5</sup> "is the fruitful mother of evils"; and in the present instance the slippery words "duty"<sup>6</sup> and "negligence"<sup>7</sup> are responsible for much of the progeny. Too often the mere statement of a conclusion that "the statute creates a duty to the plaintiff" is used as if it furnished some reasons in its own support.<sup>8</sup> At times it is coupled with the further assertion

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<sup>4</sup> See Thayer's Preliminary Treatise on Evidence, 226-229, 249-253.

This is one of the "parts of the administration of justice" which, as Professor Pound has said, "obstinately resist the attempt to reduce them completely to the domain of law. We think of some of these in our law as presenting cases peculiarly for the jury, and conceal the breakdown of our elaborate system of legal rules in these cases by making it appear that no more than questions of fact have been involved." "Justice according to Law," 13 Col. Law Rev. 699.

<sup>5</sup> 6 HARV. L. REV. 21. Cf. Professor Hohfeld's observations on "chameleon-hued words" in his able discussion of "Some Fundamental Legal Conceptions as applied in Judicial Reasoning," 23 Yale Law Journal, 29.

<sup>6</sup> See pp. 324-5, below.

<sup>7</sup> Terry, Leading Principles of Anglo-American Law, § 200; Salmond, Torts, 3 ed., § 5.

<sup>8</sup> Cf. *Bullock v. Del. L. & W. R. R. Co.*, 60 N. J. L. 24, 26; Beale's Cases on Carriers, 185. "What could the company lawfully do under these circumstances? Anything which the company might do, to be lawful, must be an act which would cast no after duty on it to the passenger in respect to such act, nor subject the company to any after liability for damages by reason of having done it. Such after responsibility would incontestably prove that the company had overstepped the line which circumscribed its right to redress itself. Applying this test, can the act of the company, which constitutes the alleged wrong in this case, be justified?"

that "the plaintiff therefore has a remedy," as if this were something more than an identical proposition. In either form the question how the duty arose, and what it was that gave rise to it, is left in the same darkness as before. But this is manifestly the very question at issue.

In seeking the principles which determine the answer, the infinite variety of criminal statutes must be faced at the outset. The field includes the whole range of human activity, and legislative treatment must vary correspondingly.<sup>9</sup> Criminal statutes may be classified in all sorts of ways, according to the point of view from which the matter is approached. One basis of classification, however, naturally suggests itself when civil responsibility is under discussion, *i. e.*, the distinction between a statute which forbids an act, and one which requires affirmative action. This corresponds with a fundamental distinction in the law of torts, and as different principles are involved it will be well to deal separately with these two classes of statutes — those prohibiting action and those requiring action.<sup>10</sup>

#### PROHIBITIONS.

Instances of prohibitive legislation suggest themselves in abundance — health laws, traffic ordinances, speed limits, police regulations of all sorts. Suppose, for example, that an ordinance makes it a misdemeanor punishable by a fine to leave a horse unhitched on a highway. The defendant leaves his horse unhitched contrary to the ordinance and it runs away and injures the plaintiff. How does the fact that he has violated the ordinance affect his civil liability?

The first step in answering this question is to construe the ordinance. This, for our present purposes, means ascertaining not only its scope and meaning, but also the evil at which it was aimed — its object as well as its purport. In the case supposed both are plain. The language is free from ambiguity, and the aim is evi-

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<sup>9</sup> See the opinion of Wright, J., in *Sherras v. De Rutzen*, [1895] 1 Q. B. 918; Beale's *Cases on Criminal Law*, 2 ed., 379.

<sup>10</sup> The importance of this distinction has been shown by writers of authority: Wigmore, *Summary of the Principles of Torts*, §§ 167, 201; 1 Street, *Foundations of Legal Liability*, 172-175.



dently to lessen the danger to the public from straying or runaway horses.

It is common, at least in the case of statutes, to treat the question of construction as if it should go further than this and include an inquiry into the probable purpose of the statute with reference to private individuals — whether it was enacted for their benefit and was intended to give them a right of action. But this sort of speculation as to unexpressed legislative intent is a dangerous business, permissible only within narrow limits; and the tendency to over-indulge it is responsible for much of the confusion in the law. Proper regard for the legislature includes the duty both to give full effect to its expressed purpose, and also to go no further. The legislature could, if it chose, have provided in terms that any one injured by a breach of the statute should have a remedy by civil action. Such a provision is familiar in criminal statutes. Its omission in this instance must therefore be treated as the deliberate choice of the legislature, and the court has no right to disregard it. On the other hand, the argument that the failure to give a private action bespeaks an intent that the statute shall have no effect on private rights has little weight. The legislature must be assumed to know the law, and if upon common-law principles such a statute would affect private rights, it must have been passed in anticipation of that result. The legislature is to be credited with meaning just what it said — that the conduct forbidden is an offense against the public, and that the offender shall suffer certain specified penalties for his offense. Whether his offense shall have any other legal consequence has not been passed on one way or the other as a question of legislative intent, but is left to be determined by the rules of law. The true attitude of the courts, therefore, is to ascertain the legislature's expressed intent, to refrain from conjecture as to its unexpressed intent (except in so far as that inquiry is necessary in order to give effect to what is expressed), and then to consider the resulting situation in the light of the common law. If his crime does not increase the wrongdoer's civil responsibilities on common-law principles, without calling in aid supposed legislative intent, then it should not affect them at all.

The impropriety of such speculation about an unexpressed legislative purpose to benefit individuals is more clearly apparent with an ordinance than a statute. An inferior body exercising delegated

powers must keep strictly within them; and the authority to create new civil rights and duties is not to be inferred from the mere power to enact traffic ordinances and provide penalties for breaking them.<sup>11</sup> If the effect of such an ordinance is to change the relations of individuals to one another, this must come about not through the intent of those who enacted the ordinance, but by the operation of common-law principles. It thus becomes a question of applying to the situation the principles of the law of negligence, in the light of which the ordinance was passed. By what tests would the defendant's liability have been determined before the date of the ordinance? and were those tests necessarily affected by its enactment?

Before the ordinance the plaintiff, injured by the runaway horse, must have based his action on negligence. Whether the defendant was negligent in leaving the horse unhitched would have been for the jury to say, unless this was so clear one way or the other that the court must deal with it as a "question of law" (so-called); *i. e.*, as a point on which fair minds could reach but one conclusion. In any situation less extreme the whole matter would have been within the jury's province. And the jury was bound in deciding it to use the test of the "ordinary prudent man." They could not acquit the defendant of negligence without saying that an ordinary prudent man would have left his horse unhitched under these circumstances; that with such a horse as this, and in such a place, the prudent man would have foreseen no danger to others — for the foresight of the prudent man in the defendant's position (in other words, the probability of danger from his standpoint) is the test of negligence. The jury was justified either in accepting or rejecting the theory that he was negligent, for the mere fact of submitting the issue of negligence to them means that a finding either way is warranted by the evidence. The reasonableness of the defendant's conduct was thus in the eye of the law an open question, depending on the circumstances and the inferences fairly to be drawn from them.

Suppose now the situation to be changed by the single circumstance of the ordinance, all other facts remaining the same. Can

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<sup>11</sup> See *Philadelphia & R. R. Co. v. Ervin*, 89 Pa. 71, and note in Bohlen's *Cases on Torts*, p. 184; W. P. Malburn, *Violation of Laws Limiting Speed as Negligence*, 45 *Am. L. Rev.* 214.



the issue of negligence any longer be left to the jury? Not unless they would be justified in finding for either party; and what must a finding for the defendant on this issue mean? That an ordinary prudent man, knowing the ordinance — for upon familiar principles he can claim no benefit from his ignorance of the law — would have chosen to break it, “reasonably” believing that damage would not result from his action. It must then, upon this view, be deemed consistent with ordinary prudence for an individual to set his own opinion against the judgment authoritatively pronounced by constituted public authority, for the ordinance has prohibited leaving *all* horses unhitched, without exception, and has done this in order to prevent just such consequences as have occurred. It has thus declared the danger to be so serious and constant that a less sweeping prohibition would be inadequate. And when eminent courts, using familiar phraseology, state that the breach of the ordinance is not “negligence *per se*,” but only “evidence of negligence,” and leave the question of negligence as a fact to the jury, they are doing nothing less than informing that body that it may properly stamp with approval, as reasonable conduct, the action of one who has assumed to place his own foresight above that of the legislature<sup>12</sup> in respect of the very danger which it was legislating to prevent.<sup>13</sup> And the incongruity does not stop here. The plaintiff can in no event recover unless he shows not merely that the defendant was negligent, but also that his negligence proximately caused the injury; no negligence, however serious, will avail him if the causal connection is lacking and the injury would have come about none the less had the defendant used due care. Sending the case to the jury therefore means that there is evidence which would warrant a finding for the plaintiff on both points,— negligence and proximate cause. In this state of affairs

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<sup>12</sup> Here and elsewhere I have used the word “legislature” indiscriminately whether a statute or an ordinance was in question; for in both cases it is the action of the constituted legislative authority regulating affairs within its proper province.

<sup>13</sup> In *Ubelmann v. American Ice Co.*, 209 Pa. 398, the court describes the ordinance as “evidence of municipal expression of opinion, on a matter as to which the municipal authorities had acted, that the defendant was negligent”; and in *Riegert v. Thackery*, 212 Pa. 86, instructions to the jury are approved “that if they should find that a reasonably prudent person, under the circumstances, would not have erected a shed over the pavement or given warning of the danger from the erection of the building to those on the pavement, the defendant was not negligent, notwithstanding the ordinance.” See *Bohlen’s Cases on Torts*, 184, note.

an instruction that the breach of the ordinance is no more than "evidence of negligence" must mean that the jury is justified in pronouncing reasonable the conduct of a defendant when he not only assumed to be wiser than the legislature in his foresight, but when looked at also from the standpoint of hindsight he was wrong and the legislature was right in this particular case. Unless the court were prepared to go to this length it would be bound to say that if the breach of the ordinance did in fact contribute to the injury as a cause the defendant is liable as a matter of law;<sup>14</sup> but this is treating it as "negligence *per se*," to use the ordinary phraseology, and not merely "evidence of negligence."

The doctrine that a breach of the law is "evidence of negligence" is in truth perplexing and difficult of comprehension. It stands as a sort of compromise midway between two extremer views: (1) that a breach of law cannot be treated as prudent conduct; (2) that the ordinance was passed *alio intuitu* and does not touch civil relations.<sup>15</sup> Either of these views is intelligible; but to invite the jury to consider when and to what extent it is reasonable to break the law is a strange thing.<sup>16</sup> The prudent man, it seems, is a law-abiding person within limits, but he does not carry his respect for law to extremes. What tests or considerations

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<sup>14</sup> This may sometimes be the court's meaning when the phrase "evidence of negligence" is used; in other words, the permission to find for the defendant may mean that the jury would be warranted in concluding, not that the defendant was in the exercise of due care in breaking the law, but that his violation did not in fact contribute as a cause of the injury. If this is the court's meaning, the only criticism to be made is on the unfortunate choice of language to express it.

<sup>15</sup> For an argument in support of this view see Mr. Malburn's article on "Violation of Laws Limiting Speed as Negligence," 45 Am. L. Rev. 214. The admission of the ordinance is sometimes justified as bearing on the plaintiff's contributory negligence, since he may have reasonably relied on the defendant's not breaking it. See *Connor v. Traction Co.*, 173 Pa. 602; *Bohlen's Cases on Torts*, 185, note. But if it may be reasonable for the defendant to break the ordinance (note 13, above), how is the plaintiff justified in assuming that he will not?

<sup>16</sup> The argument that a breach of law may be prudent conduct in fact is strongest in the case put by Knowlton, C. J., in *Newcomb v. Boston Protective Department*, 146 Mass. 596, 600, of a mistake of fact; the sale of milk, for example, reasonably supposed to be pure when the statute makes the seller's belief immaterial. The doctrine, however, that illegality is only "evidence of negligence" is not limited to such cases as this, but is commonly applied to the choice of conduct known to be unlawful, or to ignorance of the law; and whether it was an error of judgment or a mistake of fact which induced the breach of law, one whom it has injured without fault of his own may justly insist that the defendant acted at his peril.



are to guide the jury in determining when he may reasonably become lawless? The proposition that his breach of law is "*prima facie* evidence" of negligence helps but little, for the very statement implies that the *prima facie* impropriety may be rebutted. If so, what will rebut it? The doctrine in any form puts the court in an unsuitable attitude toward the legislature. And the fact that the offense is the violation not of a statute but of a municipal ordinance does not materially change the situation. Whether it be a statute or an ordinance, none the less the state has spoken through a legislative body having authority to deal with the situation; a standard of conduct has been fixed in order to prevent a public evil; and the liberty of the individual has been curtailed for the protection of others. When such a prohibition has been violated and the very evil aimed at by the law has been brought about, approval of the wrongdoer's conduct by the court is not consistent with proper respect for another branch of the government. A doctrine which sanctions such approval would hardly continue unless as a practical matter juries could be counted on to nullify it; and it would never have grown up but for the confusion of language already referred to. Its parentage is not hard to trace; it can be affiliated on "negligence" and "duty." The proposition that a municipal ordinance of this sort "does not create duties to individuals" has a plausible sound, and leads easily to the conclusion that breach of such an ordinance cannot be more than "evidence of negligence."<sup>17</sup> It is worth while, therefore, to state the situation in terms of "duty." What precisely was the "duty of care" which existed before the ordinance was passed?

(1) In the first place, it was a "duty" without a corresponding right in anybody.<sup>18</sup> When a plaintiff can invoke no legal remedy of any sort, either redressive or preventive, against conduct to which he objects, it cannot be said that a legal right of his has been infringed. Evidently, then, there is no "duty" of care in the same sense that there is a "duty" not to break a contract or not to trespass on another's land. The only protection given by the law to the plaintiff's interest is a right of action if he is harmed by the defendant's negligence. The "duty" means only

<sup>17</sup> See, e. g., *Phil. & R. R. Co. v. Ervin*, 89 Pa. 71; *Bohlen's Cases on Torts*, 183.

<sup>18</sup> *Terry, Leading Principles of Anglo-American Law*, §§ 113-115, 121-125.

that the defendant is negligent at his peril,<sup>19</sup> just as he keeps at his peril savage beasts, or (where Fletcher v. Rylands is law) some things stored on his land. It would be consistent to extend the established usage and say that there is a "duty" not to keep a dog which has enjoyed his first bite.

(2) The "duty" attaches only to positive conduct;<sup>20</sup> excepting in a few special relations a man who has made no contract is liable for his acts only, and not for his omissions, no matter how wicked or how harmful these may be. And not only is his liability limited to active conduct, but to *dangerous* conduct, *i. e.*, conduct which threatens harm to others unless care is used. The "duty of care" attaches only to such conduct; if a prudent man would foresee no injurious consequences from his acts, whether careful or not, then there is no obligation to use care. Danger, reasonably to be foreseen at the time of acting, is the established test of negligence. The proposition, then, that the defendant is under a "duty of care" to certain persons in a certain situation means that as to them he acts at peril if he does dangerous things carelessly.

How does the ordinance change this situation? Before its passage the common-law liability was for negligent conduct; "negligent" meant "dangerous"; the test of danger was the foresight of the prudent man; the jury, within the territory where opinions could reasonably differ, was to say what he would have foreseen; outside this territory the question was for the court. The ordinance narrows the last question.<sup>21</sup> The court can no longer

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<sup>19</sup> "Duty" is, however, a natural word to use for this purpose: (1) because the test is one of rightness, negligence being conduct that is in some sense morally as well as legally objectionable; (2) because of the characteristic feature of the common law requiring a *relation* between the parties, so that negligence toward one person is not necessarily negligence toward another. Both these conceptions are aptly enough expressed by the word "duty."

<sup>20</sup> This proposition has been somewhat obscured by the much-quoted observation of a distinguished judge (Willes, J., in *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. 600, *Smith's Cases on Torts*, 2 ed., 204), that "confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use." When this remark, made with reference to a contract, is wrenched from its context and made to do duty as an exposition of negligence in the law of torts, the subject is not clarified.

<sup>21</sup> This is well brought out by Hamersley, J., in *Monroe v. Hartford St. Ry. Co.*, 76 Conn. 201, 2 *Wigmore's Cases on Torts*, 185; and by Mitchell, J., in *Osborne v. McMasters*, 40 Minn. 103, *Smith's Cases on Torts*, 2 ed., 95.



submit the question of danger to the jury, because there is no longer room for a reasonable difference of opinion.<sup>22</sup> The ordinance has foreclosed the question whether an unhitched horse is a dangerous thing, not because it was passed with any specific reference to civil suits, but because the state, through its legislative organs, has condemned the act of leaving him unhitched by reason of its tendency to bring about just such harm as this. This can only mean that the act is labelled "dangerous." It is an unjust reproach to our old friend the ordinary prudent man to suppose that he would do such a thing in the teeth of the ordinance. It would mean changing his nature, and giving over the very traits which brought him into existence. And when by so doing he caused the very harm which the ordinance aimed to prevent, he would be the first to admit that he should break the ordinance at his peril. The reasons which have led the law to declare that he is negligent at his peril, or keeps a savage animal (or in England a reservoir) at his peril, apply more strongly here.<sup>23</sup>

An analogy may be found in the law concerning public nuisances. Such an analogy should be scrutinized with care, for "nuisance" is a good word to beg a question with. It is so comprehensive a term, and its content is so heterogeneous, that it scarcely does more than state a legal conclusion that for one or another of widely varying reasons the thing stigmatized as a nuisance violates the rights of others.<sup>24</sup> But for our present purposes a wrongful obstruction of the highway makes a fair illustration. Such an obstruction is a legal wrong because it prevents the public from using the highway safely and conveniently. The state may therefore proceed against the offender. An individual, however, has no right of action until he suffers special and peculiar damage; if

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<sup>22</sup> "In any case the standard is usually defined as that degree of care that men of ordinary care and prudence usually exercise. But when the standard is fixed by law or ordinance, how can one be heard to say that he exercised care in exceeding, or in refraining to comply with, the standard fixed?" Frick, J., in *Smith v. Mine & Smelter Supply Co.*, 32 Utah 21, 30.

<sup>23</sup> So far at least as concerns civil suits there is no help in "the old fashioned distinction between *mala prohibita* and *mala in se*." Such a discrimination is as unworkable as it is unscientific, and as Sir Frederick Pollock says (*Torts*, 8 ed., p. 27), it "is long since exploded."

<sup>24</sup> See Terry, *Leading Principles of Anglo-American Law*, § 434; 2 Cooley on *Torts*, 3 ed., 1176.

he suffers such damage, he has his private action.<sup>25</sup> Thus the defendant, although his act is wrongful as to the public, stands as to individuals only in the position of acting at his peril. This is the same result to which the foregoing argument leads in the case of the present ordinance, and the situation is in all its essentials the same.<sup>26</sup> The legislature's power to extend and make definite the law of nuisance is beyond question; and the present ordinance amounts to exactly this — that a horse in the city streets, unhitched and unattended, *is* a public nuisance. Thereafter the presence of the unhitched animal is a legal wrong for the same reasons, and in the same way, as any other unlawful obstruction.<sup>27</sup>

The same analysis fits a multitude of other cases. As society develops, new dangers to the public welfare are constantly perceived, and new prohibitions are enacted by the legislature. They may be regulations of highway traffic, — the position of vehicles on the highway,<sup>28</sup> the speed at which they may run,<sup>29</sup> the conduct of railways at crossings;<sup>30</sup> or building laws passed to lessen fire risks;<sup>31</sup> or restrictions on the use of dangerous articles, such as the carrying of firearms by children,<sup>32</sup> or the sale of poisons unlabeled,<sup>33</sup> or handling explosives without specified precautions.<sup>34</sup>

<sup>25</sup> The requirement that the damage suffered by the plaintiff must have been "special and peculiar" to entitle him to recover has no doubt at times been somewhat rigidly insisted upon; but whether or not it has been too narrowly applied, the principle is none the less clear. See *Stetson v. Faxon*, 19 Pick. 147; *Aldrich v. Wetmore*, 52 Minn. 164.

<sup>26</sup> This is well brought out by Knowlton, C. J., in his able and important opinion in *Bourne v. Whitman*, 209 Mass. 155, 167.

<sup>27</sup> So in *Siemers v. Eisen*, 54 Cal. 418, the court said: "The practice of leaving animals, attached to vehicles, unfastened upon our public streets, and thus placing in jeopardy the lives of men, women, and children, should not be tolerated. It is, in fact, condemned by the law, and when damages result therefrom, the owner of such animal should be held to a strict legal accountability." To the same effect is *Bott v. Pratt*, 33 Minn. 323. For the contrary view, that the violation is only "evidence of negligence," see *Knuffle v. Knickerbocker Ice Co.*, 84 N. Y. 488, *Smith's Cases on Torts*, 2 ed., p. 94; *Fluker v. Ziegele Brewing Co.*, 201 N. Y. 40.

<sup>28</sup> *Newcomb v. Boston Protective Dept.*, 146 Mass. 596, *Smith's Cases on Torts*, 2 ed., 122.

<sup>29</sup> *U. S. Brewing Co. v. Stoltenberg*, 211 Ill. 531, 1 *Wigmore's Cases on Torts*, 1058.

<sup>30</sup> *Holman v. Chic. R. Co.*, 62 Mo. 562, *Smith's Cases on Torts*, 2 ed., 107.

<sup>31</sup> *Aldrich v. Howard*, 7 R. I. 199, *Smith's Cases on Torts*, 2 ed., 90. Observe the careful qualification of this case in *Grant v. Slater Mill Co.*, 14 R. I. 380.

<sup>32</sup> *Horton v. Wylie*, 115 Wis. 505.

<sup>33</sup> *Osborne v. McMasters*, 40 Minn. 103, *Smith's Cases on Torts*, 2 ed., 95.

<sup>34</sup> *Brannock v. Elmore*, 114 Mo. 55; *Smith v. Mine & Smelter Supply Co.*, 32 Utah 21.



Whatever form the prohibition may take, and the varieties are infinite, a danger has been deemed by the legislature so great as to justify making its creation or continuance a public wrong. A new statutory "nuisance" has thus been created in every sense in which that word has legal significance; and the proposition that he who violates the statute or ordinance does so at his peril is only an application of the principle that an action lies in favor of one who has suffered a private injury from a public nuisance.<sup>35</sup>

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<sup>35</sup> It is worth noticing that in continental systems the wrongdoer's liability for damages occasioned by his breach of the criminal law is treated as a matter of course, and the damages are awarded in the criminal proceeding. Code Instr. Crim., Art. 3; Germ. Penal Code, §§ 230, 231. The theory is stated thus by Bosc, *Essai sur les Éléments constitutifs du Délit*, 66, 72:

*Acte prouvé et puni par la loi pénale.* — La victime n'a rien à prouver contre leur auteur au point de vue du caractère illicite. Ce caractère découle du fait que l'acte est interdit par la loi pénale. Il est évident que pas plus au point de vue civil qu'au point de vue pénal, on n'a le droit de faire ce que la loi interdit, et le particulier lésé par une crime est légitimement fondé à obtenir réparation du tort qu'il a subi, comme la société du trouble dont elle souffre.

*Inobservation d'un règlement.* — Un règlement légalement promulgué constitue une loi pour ceux qu'il vise et s'impose d'une façon absolue à leur observation. S'ils y contreviennent, ils peuvent être punis de peines plus ou moins fortes. Aussi dirons-nous que, si de cette inobservation résulte un préjudice pour quelqu'un, ce préjudice devra être réparé par celui qui a contrevenu au règlement. Ici encore, l'acte est illicite en soi, parce qu'il a été accompli en violation d'une sorte de loi, et il suffit à la victime d'établir le caractère obligatoire du règlement, et de prouver que, s'il eût été observé, le préjudice eût été évité. Ce sera par exemple, une Compagnie de chemin de fer qui aura négligé de fermer ses portières, ou un charretier qui n'aura pas tenu la gauche de la route, etc.

La seule différence qui sépare cette hypothèse de la précédente, c'est qu'ici au lieu d'être en présence d'une loi obligatoire pour tous, nous ne sommes en présence que d'un règlement obligatoire pour quelques-uns, et qui ne peut rendre illicite par lui-même l'acte d'un individu auquel il ne s'applique pas. La Compagnie de chemin de fer, par exemple, obligée de fermer ses portières, est responsable par cela seul de l'accident causé par leur nonfermeture. Si, au contraire, un accident arrivait dans une voiture de place, par suite de portières mal fermées, la victime (la chose en fait ira de soi, nous parlons ici théoriquement) aurait à prouver l'imprudence ou la négligence du cocher.

This passage, as well as other illustrations used by the author, show that the "règlement" to which he refers is a regulation having the force of law and not a mere rule of the company. The regulations, indeed, of a government railway, if penalties were provided for their violation, would not stand like the rules of a private corporation. Whether the breach of such rules is evidence of negligence raises a different question, as to which compare *Hoffman v. Cedar Rapids Co.*, 139 N. W. 165 (Sup. Ct. Iowa) with *Stevens v. Boston Elevated Railway Co.*, 184 Mass. 476.

## AFFIRMATIVE REQUIREMENTS.

So much for statutes forbidding objectionable conduct and punishing one who does the forbidden thing. But suppose the statute calls for action, and punishes a failure to do the thing required. Here different considerations come in. The reasons already given will not help one who sues for a private injury, for they were based on the defendant's dangerous conduct. A plaintiff harmed by such conduct had rights at common law, and the effect of the statute or ordinance in changing the test of liability was only incidental to the operation of common-law principles. But where it is a mere omission there is no basis for liability at the common law. If there is a civil action it must arise in some other way.

To take a familiar illustration, suppose a statute<sup>36</sup> requires abutters to remove snow and ice from their sidewalks. The violation of such a law, although a public wrong, involves no wrongful positive conduct in the abutter. He has merely omitted to take from the path of travel what nature brought there. If a traveler injured by the obstruction seeks a remedy against the abutter, he will make no headway by the aid of common-law principles. To prevail he must show an actual intent in the statute that a person injured by its breach shall recover his damages from the abutter; in other words, he must read such a clause into the statute by implication. Is such an implication warranted?

One or two discriminations must be observed at the outset.

(1) It may be a difficult question in any given case whether the statute is really a prohibition or an affirmative requirement.<sup>37</sup>

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<sup>36</sup> This snow and ice question (as to which see Bohlen's Cases on Torts, 179, note 5; 12 Col. Law Rev. 749) is usually raised by a municipal ordinance and not a statute, but this is not always so; see, e. g., *Taylor v. Railroad Co.*, 45 Mich. 74. And the present point is best brought out by supposing a statute.

<sup>37</sup> *Dawson & Co. v. Bingley Urban District Council*, [1911] 2 K. B. 149, is an interesting case in which this question was much discussed by the Court of Appeal. The defendant was a municipal board charged with the duty of furnishing water for fire protection, and among other things providing proper fire plugs and putting up signs in the streets to show their situation. They put up the sign in the wrong place, and this delayed the fire brigade in hunting for the plug while the plaintiff's building was burning. The court held the defendant liable for the plaintiff's additional damage during this delay, basing its decision on the ground that the defendant had been guilty of a misfeasance. This was a curious situation. The defendant no doubt did something negligently; and the court treated it as in *Metallic Casting Co. v. Fitchburg*



This difficulty in discriminating a misfeasance from a nonfeasance often arises in the law in different forms; and in the present case it will not be solved by the mere words of the statute. It is preëminently the sort of matter in which the court must not stick in the bark; the problems raised by mandatory injunctions show how unlimited is the power of mere words to express in negative form what is affirmative in substance. The nature of the first ordinance under consideration would not have been changed if the legislature had phrased it as an affirmative requirement that all horses be hitched; nor the second, if it had prohibited the act of keeping the snow on the sidewalk.<sup>38</sup> In every case the test must be the true nature of the situation in substance and reason. If the defendant's breach of law amounts, on a true analysis, to injurious active conduct, the plaintiff may invoke the principles above set forth in support of his private action; otherwise he cannot. The difficulties of this analysis are responsible for some of the confusion and conflict of decision over the statutes requiring a railroad to fence its right of way.<sup>39</sup>

(2) An important class of statutes regulates the conduct of persons who were already under affirmative common-law duties. If a shipmaster be required to keep medicines on board for his passengers, or an employer to maintain safety appliances, the legislature is prescribing details concerning protection which in some form the carrier and employer were already bound to give — making definite and specific that which before was governed by the general test of reasonableness. There is no difficulty about giving the

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R. R., 109 Mass. 277, where the defendant was held liable for negligently cutting the hose which was playing on the plaintiff's burning factory. But in the Dawson case the misplaced sign was a part of the defendant's system; and it is hard to distinguish this from other negligent conduct depriving the plaintiff of a proper supply of water, for which the defendant would not be liable under *Atkinson v. Newcastle & Gateshead Waterworks Co.*, 2 Ex. Div. 441. As to misfeasance and nonfeasance in these cases see also *Cowley v. Newmarket Local Board*, [1892] A. C. 345; *Glossop v. Heston Local Board*, 12 Ch. D. 102; *Mayor of Shoreditch v. Bull*, 90 L. T. N. S. 210.

<sup>38</sup> Cf. Mass. St. 1909, c. 534, § 22, punishing one "who knowingly goes away without stopping and making himself known after causing any injury." *Commonwealth v. Horsfall*, 213 Mass. 232. "The distinction between a nonfeasance and a misfeasance is often one more of form than of substance." *Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray, 339, 346.

<sup>39</sup> *Hayes v. Mich. Cent. R. R.*, 111 U. S. 228; *Menut v. Boston & Maine R. R.*, 207 Mass. 12, and cases cited. And see note 62, below.

injured person the benefit of this legislation without any express provision to that effect in the act. Here, as in the case of the unhitched horse, the necessary effect of the legislative action properly interpreted is to replace the old by new and exacter standards.<sup>40</sup>

In cases which fall under neither of these heads it is a dubious and a dangerous thing for the courts to speculate as to unexpressed legislative intent and create private remedies by implication. So far as this matter is concerned, the same considerations are involved as in the case of prohibitive statutes.<sup>41</sup> Of course the statute must be fairly treated; and if a private action is necessary to carry it into effect, the legislature must be credited with intent to provide such a remedy. No doubt, too, the purpose of some criminal statutes is to provide an emphatic sanction for the protection of private rights — as in acts making trespass to land a criminal offense. In such cases, “although the proceeding is criminal in form it is really only a summary mode of enforcing a civil right.”<sup>42</sup> But in the ordinary case the court cannot overlook the fact that the legislature *chose to omit* any provision for a private remedy. This omission of a perfectly familiar provision cannot be treated as accidental, and adding such a clause by implication means putting a different burden on the defendant from that which the legislature saw fit to impose. Important as it is to give full effect to what the legislature has said, reading the statute in the light of common-law principles, it is not less important to keep within the bounds fixed by the legislature, and not lightly enter upon the field of extension by implication, even though it be reasonable implication.

Looseness on this point has been bred by Lord Campbell’s much-cited judgment in *Couch v. Steel*.<sup>43</sup> The statute involved in that case, requiring medicines to be kept on board ship, plainly dealt with a duty already owed by the master to his passengers and crew, and the only doubt was whether a penalty prescribed by the act was intended to be the exclusive remedy for its breach. This penalty was not limited to the injured person, but was given to a

<sup>40</sup> See pp. 325–6, above.

<sup>41</sup> See p. 320, above.

<sup>42</sup> Wright, J., in *Sherras v. De Rutzen*, [1895] 1 Q. B. 918, 922. But in a case of this sort the plaintiff has no need of calling the statute in aid of his civil action.

<sup>43</sup> 3 E. & B. 402.



common informer, and there seems nothing to criticize in the decision that a seaman injured by the master's violation of the act should have his private action. But in reaching this result Lord Campbell quoted without qualification the statement of Comyns's Digest that "in every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the said law," as if it meant that in all cases where one whom a criminal statute was intended to benefit is harmed by its breach, whether omission or commission, and whether the statute provides a remedy or not, he has a right of action; and this has often been repeated in the same broad way. Such a notion is far from the meaning of the passage quoted by Lord Campbell, as is shown by the context and the judgment of Lord Holt from which it was taken;<sup>44</sup> and the breadth of Lord Campbell's language was limited with characteristic accuracy by Lord Cairns in *Atkinson v. Newcastle & Gateshead Waterworks Co.*, 2 Ex. Div. 441,<sup>45</sup> a suit by a private individual for damages caused by a waterworks company's failure to furnish the service required by its charter. Such a suit raises very different questions from those involved in *Couch v. Steel*; but a literal application of Lord Campbell's language would cover both alike. Once it be made to appear, in the case of a statute like this or like that requiring the abutter to remove snow and ice from the sidewalk, that there are reasonable grounds on which the legislature *may*

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<sup>44</sup> The section of Comyns's Digest (F, "Action upon Statute by the Party grieved") begins with a series of illustrations in each of which the statute expressly provided a penalty, considers whether in these cases the penalty was limited to the party aggrieved and whether it excluded other remedies, and then continues with the passage quoted by Lord Campbell in *Couch v. Steel*, citing for this Lord Holt, 6 Mod. 27. This was Lord Holt's judgment in full: "If money be devised out of lands, sure the devisee may have *debt* against the owner of the land for the money, upon the statute of 32 Hen. VIII, c. 1, of Wills; for wherever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity; and the action must be against the *terre-tenant*." It is a far cry from the subject matter of this opinion, and from Lord Holt's defense of his prerogatives against the encroachments of chancery, to the proposition that private rights are created by criminal statutes.

<sup>45</sup> See also *Johnston v. Consumers' Gas Co.*, [1898] A. C. 447; *Beven*, *Negligence in Law*, 3 ed., 305 *et seq.*

have preferred to leave the defendant under obligations to the public only, the omission of any express provision for a private remedy is a sufficient ground for denying its existence.

The application of these general principles raises many interesting questions which cannot be discussed within the limits of a single article. One or two of them, however, may be glanced at.

1. What are the rights of a trespasser or a bare licensee injured by the defendant's unlawful act — a trespassing child, for example, hurt by explosives illegally kept,<sup>46</sup> or a licensee who falls into a shaft illegally left unguarded?<sup>47</sup>

The first step in answering such a question, after ascertaining the meaning of the statute and the evil at which it was aimed, is to determine the rules of law which would govern if there were no criminal statute in the case. It is this which largely accounts for the delicacy and variety of the questions raised by modern criminal legislation in its effect on civil rights. That effect cannot be known until the common law governing the situation is first determined; for however artificial may be the assumption that the legislature understood the law, it is an assumption from which the court cannot depart. It may be hard, even for the court, to determine the common-law rule;<sup>48</sup> and that rule may not be easy to justify in rea-

<sup>46</sup> *Bennett v. Odell Mfg. Co.*, 76 N. H. 180.

<sup>47</sup> *Hamilton v. Minn. Desk Co.*, 78 Minn. 3.

<sup>48</sup> So in *Ryall v. Kidwell*, [1913] 3 K. B. 123, the difficulty of the question comes entirely from the common-law problems which are involved. The Housing Act provided that in every contract for letting there should be implied a condition that the house was in all respects fit for habitation, and that this should take effect as if there were an undertaking of the lessor that the house should be so kept during the holding. A divisional court (Ridley and Avory, JJ.) held that this affected only the contract between the landlord and tenant and gave no rights to a member of the tenant's family, treating this as a necessary consequence of *Cavalier v. Pope*, [1906] A. C. 428. The correctness of this conclusion must depend, it would seem, on the breadth of the doctrine for which *Cavalier v. Pope* stands, and how far it must be qualified by the considerations discussed in *Miles v. Janvrin*, 196 Mass. 431; 200 Mass. 514; obviously a question of much nicety. Cf. *Tvedt v. Wheeler*, 70 Minn. 161.

Again, in *Baxter v. Coughlin*, 70 Minn. 1, the court dealt — perhaps rather summarily — with delicate questions in the law of corporations and agency in deciding that bank directors who did not personally receive a deposit were rendered liable to a depositor by reason of a statute punishing the receipt of deposits if a bank was known to be unsafe or insolvent.



son or to reconcile with legal principle;<sup>49</sup> but however that may be it is theoretically one of the data which the legislature had before it when it acted.

In the case of trespassers and licensees several difficult questions arise. If the defendant did the harm by active conduct after the plaintiff's presence was, or should have been, known, what duty was owed him? Some courts would hold the defendant up to the external standard of the ordinary prudent man, even in favor of a trespasser;<sup>50</sup> others would refuse to do this even (under some circumstances at least) when the plaintiff was a licensee,<sup>51</sup> and would hold him responsible only if his conduct was wanton and reckless — in other words, would impose a subjective test only and require a *mens rea*. If it were not a case of active force applied after the plaintiff's presence was known, but a dangerous condition of the premises — and this would be the ordinary situation in the sort of case now under discussion — there would be no duty of care, and no liability without a "trap" of some sort. But the tests to determine whether a "trap" exists will not necessarily be the same for trespassers and licensees, and difficult questions may be raised by changes in the condition of the premises after the license was given. These questions must be solved before the effect of the statute can be ascertained; and it must then be determined what is added by the statute.

Whenever due care is the issue, the breach of the statute supplies the legal equivalent of negligence. The defendant is in no position to meet the test of the prudent man. Here is no question of *mens rea*; the defendant may have been innocently heedless, or congenitally incapable of the care required; but regardless of moral considerations he must at his peril come up to the legal standard and do what the jury deems the proper

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<sup>49</sup> The doctrine, for instance, which denies a remedy to any person except the buyer who is injured by defects in a chattel due to the seller's negligence is not easy to defend on principle; see Judge Smith's comments and the authorities cited by him in his *Cases on Torts*, 2 ed., 175; and this complicates the questions raised when the sale was in contravention of a statute. It would seem, however, that in such a case the courts should accept the statute as a legislative declaration that this is a dangerous article, and so bring the case within the exceptions which would permit a recovery at common law. See *Stowell v. Standard Oil Co.*, 139 Mich. 18; *Gately v. Taylor*, 211 Mass. 60; 27 HARV. L. REV. 98.

<sup>50</sup> *Herrick v. Wixom*, 121 Mich. 384, Smith's *Cases on Torts*, 2 ed., 375; *Myers v. Boston & Maine*, 72 N. H. 175, Smith's *Cases on Torts*, 2 ed., 385.

<sup>51</sup> *O'Brien v. Union Freight Railroad*, 209 Mass. 449.

thing. In such a case, therefore, the result will be that he who breaks the statute does so at his peril.<sup>52</sup> But it is a very different thing to find in the violation of the statute the equivalent of a *mens rea*. In the sort of statute or ordinance commonly involved in these cases no *mens rea* is required even for criminal liability; the mere fact that it has been broken tells nothing, therefore, of the defendant's state of mind. It is not clear, indeed, what the breach of the statute, in and of itself, adds to the case except to relieve the plaintiff from proving negligence, unless objectionable fictions are to be invoked in his aid; and Sir Frederick Pollock's statement that "The commission of an act specifically forbidden by law . . . is generally equivalent to an act done with intent to cause wrongful injury" <sup>53</sup> seems too broad. It may be true that in so far as the defendant's knowledge of danger enters into the definition of a "trap," a defendant who has knowingly permitted the violation of the statute should be affected also with knowledge of the danger; but in general it would seem that if before the statute the defendant, although negligent, would not have been liable without proof of some wrongful state of mind, proof of such a state of mind is just as necessary after the statute, unless it intended to provide a civil as well as a criminal remedy for its violation. In this case, therefore, even though the breach of statute was positive conduct prohibited by law, the result is the same as in the case of an omission to comply with an affirmative requirement; there can be no private action unless the legislature actually intended to give it; and there are the same strong reasons against stretching its language by implying provisions which might have been inserted but were not.<sup>54</sup>

2. Is the defendant liable when the statute aimed to prevent one sort of harm, and his violation caused harm of a different sort?

Such a situation is not common. Where the harm is not that against which the statute was directed, there is generally no causal connection between the law breaking and the injury, and the plaintiff's action fails for this reason. It would equally fail if the statute

<sup>52</sup> So when it is a defect in the condition of the premises, and the plaintiff is a business guest, so that a duty of care is owed him, he should clearly be allowed to recover. *Barfoot v. White Star Line*, 170 Mich. 349. The difficulties raised by such cases as *Parker v. Barnard*, 135 Mass. 116, *Racine v. Morris*, 201 N. Y. 240, and *Kelly v. Henry Muhs Co.*, 71 N. J. L. 358, are really in determining the plaintiff's true status at common law.

<sup>53</sup> Torts, 8 ed., 26.

<sup>54</sup> See 27 HARV. L. REV. 281.



expressly gave a private action to any person harmed by its violation.<sup>55</sup> The driver of an automobile may at the moment of a collision be committing a crime by profanely swearing, or carrying concealed weapons, or traveling without his license or without properly exposing the number of his car; but none of these things would render him liable to a wayfarer whom he injured without negligence. Criminal conduct which had no effect in causing the injury can no more be a ground of liability than non-causative negligence.<sup>56</sup> In either case the wrongdoing is without legal significance as between these parties.<sup>57</sup> But although the connection of cause and effect is rare where the statute contemplates one sort of harm and another results, it is none the less possible, and the situation raises questions of some difficulty.

*Gorris v. Scott*<sup>58</sup> makes a good illustration. A statute required carriers of animals to furnish certain protection during the transit, including separate pens and footholds. This was a sanitary regulation, aimed only at preventing disease, and not meant to give

<sup>55</sup> *Holman v. Chicago R. R. Co.*, 62 Mo. 562, *Smith's Cases on Torts*, 2 ed., 107; *McKune v. Santa Clara Co.*, 110 Cal. 480.

<sup>56</sup> *Bohlen's Cases on Torts*, 176, note. See also on this point Judge Smith's able and exhaustive discussion of "Legal Cause in Actions of Tort" in 25 *HARV. L. REV.* 103, 223, 303; *Heiting v. Chic., R. I. & Pac. Ry. Co.*, 252 Ill. 466.

<sup>57</sup> This question of the causal connection between the breach and the damage raises difficulties in cases arising under the child-labor statutes; compare *Beauchamp & Sturges v. Burn Mfg. Co.*, 250 Ill. 303, with *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489, and *Moran v. Dickinson*, 204 Mass. 559. The same problems have troubled courts in other countries. In a French case a printer's apprentice, employed in the evening in violation of a law forbidding minors to be kept at work after seven, went into the pressroom to play and was killed. The civil court of Evreux refused to hold the master responsible, saying, "Si Aubert . . . a exigé de son apprenti, en dehors des conventions, un surcroît de travail, cette exigence ne pourrait entraîner la responsabilité du patron qu'autant qu'il y aurait entre elle et l'accident une relation directe, c'est-à-dire qu'autant que l'accident pourrait être attribué au surmenage de l'apprenti, que Jousset ne le prétend nullement" . . . But the Court of Cassation reversed the judgment and allowed the boy's parents to recover on the following grounds: "Le sieur Aubert a commis une faute qui a eu pour conséquence l'indue prolongation du séjour du jeune Jousset dans l'imprimerie, prolongation sans laquelle il n'eût pas été matériellement possible à celui-ci de commettre l'acte d'indiscipline constaté à sa charge" . . . "Il résulte de là que dans une mesure à déterminer, le sieur Aubert a contribué par sa faute à occasionner l'accident arrivé à son apprenti." *Cass.* 7 Août, 1895; *Sirey*, 1896, I, 127. For comments on "cause indirecte" in the French law, see Gérard, *Les "Torts" ou Délits Civils en Droit Anglais*, 307-308.

<sup>58</sup> *L. R.* 9 Ex. 125; *Smith's Cases on Torts*, 2 ed., 103.

protection against perils of the sea. But the lack of the partitions and footholds did in fact result in the loss of the plaintiff's sheep, for a storm washed them overboard when the partitions and footholds would have saved them. Here the defendant's breach of law may fairly be regarded as wrongful positive conduct in improperly herding the animals together and carrying them without the required safeguards; and the continuous act of so transporting them without the protections which would have saved them was a proximate cause of their loss. A plausible argument may be made for the owner on the theory that he has suffered from the carrier's breach of a duty owed to him; he could clearly have recovered if the carrier's failure to separate the sheep had caused them to become infected with disease, and this on grounds already set forth, without indulging in any implications as to the intention of the statute to give a private remedy.<sup>59</sup> But the soundness of this argument is questionable. The carrier took all the care of the sheep which prudence required except in respect to the spread of disease. So far as perils of the sea were concerned, a prudent man would have acted as he did. On this point the legislature had no new light. It made stricter and more specific the precautions to be taken against disease, and in other respects left the parties to the common law. If the lack of partitions had injured a third person by causing the sheep to be dashed against him, the breach of statute would have given him no rights against the carrier. The characteristic common-law requirement of a relation between the parties in respect to the matter in hand, its insistence that the defendant's duties to others are no concern of the plaintiff,<sup>60</sup> would have disposed of the injured person's claim. The defendant's breach of duty to the state or to the owner of the sheep was nothing to this plaintiff. It is a closer case where, as in *Gorris v. Scott*, the harm has fallen upon the person to whom the "duty" was owed; but the defendant may invoke similar considerations. A new "nuisance" has indeed been forbidden by the statute, and the defendant has committed it; but his conduct is a nuisance only

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<sup>59</sup> *Cf. Evans v. Chic. & N. W. Ry. Co.*, 109 Minn. 64, holding a carrier which had brought into the state a diseased horse without complying with the inspection laws liable to a purchaser from the consignee.

<sup>60</sup> On this point see the interesting opinion of Peaslee, J., in *Garland v. Boston & Maine R. R.*, 76 N. H. 556.



in one of its aspects and in respect to one class of consequences. Just as a savage animal is kept at peril as to all consequences of his ferocity, but in other respects, like the frightening of horses by his smell, the owner is liable only for negligence,<sup>61</sup> so here he should be held to act at peril only as to the kind of harm which the legislature sought to prevent.<sup>62</sup> Any other conclusion would mean giving the statute an operation beyond the interests it was designed to protect. The decision in *Gorris v. Scott* for the defendant seems, therefore, sound; and the same result might have been reached by statutory construction, even if the act had contained the familiar clause giving the owner in terms a right of action for injuries caused by its breach.

3. Should a breach of the criminal law have the same effect in barring a plaintiff's right of action that it would have in making him liable for injuries caused to others?

A distinguished judge has suggested a different treatment of the two situations. In *Newcomb v. Boston Protective Department*, 146 Mass. 596, 603, Chief Justice Knowlton said:

"There is nothing in the language of *Hanlon v. South Boston Railroad*" [a decision that the defendant's violation of an ordinance was "evidence of negligence" only, in which the court said, "It is not true that if an unlawful rate of speed contributed to the injury that alone would give the plaintiff a right to recover if he was without fault"] "inconsistent with the principle which we have already stated. That decision related to the liability of the defendant. It may be, where a penal statute does not purport to create a civil liability, or

<sup>61</sup> *Bostock-Ferari Co. v. Brocksmith*, 34 Ind. App. 566, *Smith's Cases on Torts* 2 ed., 553. Cf. *Gregory v. Adams*, 14 Gray (Mass.) 242.

<sup>62</sup> *Richards v. Waltz*, 153 Mich. 416, involves a similar point. The defendant violated a statute requiring him to maintain certain specified danger signals and barricades when cutting ice, and this caused the death by drowning of the plaintiff's cow. The barricades required were of a kind which would afford little protection to any animals, and none at all to small animals, and the majority of the court denied the plaintiff a recovery on the ground that the statute was intended to protect human beings only. It is on similar grounds that such cases as *Menut v. Boston & Maine*, 207 Mass. 12, denying a recovery to human beings injured by a railroad's failure to fence its line, must be supported, where, as is ordinarily the case, the corporation which had the duty of fencing was running the train which caused the injury. If they were not the same person, different principles would be involved.

If these views are sound, *Osborne v. Van Dyke*, 113 Ia. 557, holding the defendant liable without evidence of negligence because he was cruelly beating a horse, seems hard to support. See also *Bohlen's Cases on Torts*, notes 178-179.

to protect the rights of particular persons, that a violation of it will not subject the violator to an action for damages, unless his act, when viewed in connection with all the attendant circumstances appears to be negligent or wrongful. And at the same time courts may well hold that, in the sanctuary of the law, a violator of law imploring relief from the consequences of his own transgression will receive no favor."

Such a distinction, treating a plaintiff with greater severity than a defendant in respect of the same conduct, may find some support both in reason and in legal analogy. For disciplinary purposes, from considerations of decency and propriety, and out of regard for its dignity, a court may refuse to listen to a suitor who has been guilty of some sorts of misconduct, regardless of the merits of his complaint as between him and the defendant. The immunity which the latter receives from the just consequences of his misconduct is deemed a lesser evil than the administration of justice by the state for the benefit of evildoers. The defense of illegality in actions of contract makes these principles familiar. But their application to such cases as the present is a very different matter.

It must be observed in the first place that the plaintiff's action is not barred by the mere circumstance that he was breaking the law when injured. Here, as in the case of a defendant, the violation of law is immaterial unless it had some causal connection with the injury. This was ably set forth in Chief Justice Dixon's well-known opinion in *Sutton v. Wauwatosa*,<sup>63</sup> allowing a recovery in a highway case to a traveler who was violating the Sunday law; and the reasoning of this opinion has now been approved even by the court whose decisions it chiefly criticized.<sup>64</sup> This principle,

<sup>63</sup> 29 Wis. 21, *Smith's Cases on Torts*, 2 ed., 115.

<sup>64</sup> See the opinion of Knowlton, C. J., in *Bourne v. Whitman*, 209 Mass. 155. Peculiarities in the earlier Massachusetts cases have somewhat embarrassed the court in its recent careful treatment of the subject in such cases as *Bourne v. Whitman*, 209 Mass. 155, and *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489. But as Judge Smith has pointed out (*Cases on Torts*, 2 ed., 122, note), the result in the Massachusetts Sunday cases, much as their reasoning has been criticized, may well be supported on the ground put forward by Ross, J., in *Johnson v. Irasburgh*, 47 Vt. 28, that the plaintiff was not entitled to the rights of a traveler. The same reasoning may perhaps justify such decisions as *Holden v. McGillicuddy*, 215 Mass. 563, denying a recovery to the occupant of an unlicensed automobile; but see the cases to the contrary cited in 27 HARV. L. REV. 93. As to the Sunday cases see also "The Plaintiff's Illegal Act as a Defense in Actions of Tort," 18 HARV. L. REV. 505, by Harold S. Davis.



that the plaintiff's criminality does not of itself bar his suit without reference to its operation in the particular case, goes far to answer the suggestion that a plaintiff should be treated more severely than a defendant; for once the court is prepared to hear the plaintiff at all and to treat his case as one fit for its consideration in spite of his wrongdoing, it must not be forgotten that the fundamental question is whether an admitted loss shall be borne by the plaintiff or shifted to the defendant. If the defendant is held liable because his unlawful conduct caused the harm, this means that the law deems it just as between the parties that he rather than the plaintiff should suffer the loss. If so, he should suffer it none the less when the parties are reversed and he appears as plaintiff. If, on the other hand, such conduct does not of itself render the defendant liable, but is only "evidence of negligence," and other elements must be made to appear before he can justly be called on to bear the loss, the plaintiff should as between the parties be entitled to a consideration of the same elements before the issue is decided against him.<sup>65</sup> And the short answer to Chief Justice Knowlton's suggested distinction in *Newcomb v. Boston Protective Department* is that the difficulty with which he was dealing existed only for a court which was bound by *Hanlon v. South Boston Railroad*,<sup>66</sup> and that his powerful reasoning in the *Newcomb* case and in *Bourne v. Whitman*<sup>67</sup> demonstrates the unsoundness of the *Hanlon* case as an original question.<sup>68</sup>

Another situation in which it is possible to treat a plaintiff and

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<sup>65</sup> The parallel situation of the parties is well brought by Hamersley, J., in *Monroe v. Hartford St. Ry. Co.*, 76 Conn. 201, where the plaintiff had violated an ordinance against leaving horses unhitched.

<sup>66</sup> The *Hanlon* case contrasts oddly with *Salisbury v. Herchenroder*, 106 Mass. 458.

<sup>67</sup> 209 Mass. 155.

<sup>68</sup> In differentiating plaintiffs and defendants the courts may have been unconsciously influenced by practical considerations. In the sort of case that commonly presents itself a jury will be quick enough to find against a defendant whose illegal conduct has caused the injury. The plaintiff therefore has accomplished all that he needs as a practical matter if he is allowed to introduce the breach of law as "evidence of negligence," and the court is not driven to any closer analysis. But when the plaintiff's conduct is in question the harshness of contributory negligence as a defense and the relative situation of the parties often make the jury grasp at any opportunity to exonerate the plaintiff of negligence even though he broke the law. Justice to the defendant thus requires that the lines be exactly drawn, and the duty to give him proper protection — protection which in the converse case the plaintiff does not need — forces the court to examine the principles more closely.

a defendant differently arises when the plaintiff's violation of law has caused harm of a kind not aimed at by the statute. Chief Justice Knowlton's suggested discrimination against the plaintiff might be applied here, and contributory illegality might be held to bar a plaintiff's action even though the same conduct with the same consequences would not have rendered him liable as a defendant. In the language, at least, of the cases,<sup>69</sup> there is some warrant for such a distinction; for the statement that illegal conduct will bar a plaintiff if it contributed to his injury is constantly made in a broad way, without the qualification about the purpose of the statute which is so familiar when the wrongdoer is sued as defendant. But such language is rarely necessary to the decision, and the distinction does not commend itself as a matter of reason. Since the plaintiff is not barred by the mere fact of his wrongdoing but only by its effect in causing the injury, it must be a question of its relation to the controversy between these parties; and the same considerations which entitle the defendant to assert the immateriality of this conduct when urged against him as a ground of liability apply no less strongly in favor of the plaintiff. The plaintiff has committed an offense against the state, which the state may punish; but what is this to the defendant? No consequences of the sort which occurred were feared or foreseen by the legislature, or would have been by the prudent man; until the statute was passed the plaintiff's conduct was blameless; and so far as concerns this defendant and these consequences it is no more blameworthy now. There are, no doubt, considerations which may be urged against this view; but in so far as these have weight, they go to show that the wrongdoer should be held liable when sued as a defendant, and not that a discrimination should be made against him when he appears as a plaintiff.

The unfitness of such a discrimination is apparent when the character of contributory negligence as a defense is considered — a defense so severe that it permits no apportionment of loss, but cuts off all redress for harm caused by a defendant's negligence even though the plaintiff's lack of care threatened harm to no one but himself, and was relatively a minor factor in causing the harm. The reinforcement brought to this stringent defense by the suggested dis-

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<sup>69</sup> See 27 HARV. L. REV. 94.



crimination against the plaintiff would come oddly at a time when the defense itself is crumbling at many points under attacks both legislative and judicial.

4. The governing principle in this whole matter — the court's duty to accept ungrudgingly the declared will of the legislature and to recognize its full logical effect in modifying the common law — has a bearing on that "part of the law still in the nebulous but clearing stage," as Hammond, J., has put it,<sup>70</sup> which concerns interferences with business by strikes and trade combinations. In such cases the court is constantly called on to determine the legitimate scope of business activity. Harm has been done intentionally, and the question is one of justification, — has the defendant kept within the rules of civic warfare?

These questions, as Sir Frederick Pollock has said,<sup>71</sup> "involve subtle considerations of a psychological kind which our ancestors thought beyond the competence of courts, or at all events of juries, and did not attempt to bring within the sphere of litigation; and in dealing with such considerations a wide field is left open to divergent views of economic and social policy." But modern legislation has much narrowed that field. The courts cannot forget that within the limits of the constitution the legislature has the absolute right to impose its economic views on the community. However unsound those views may seem, or may be, the court has only to accept and apply them. Such an acceptance may call for much self-restraint and breadth of view, and may lead to the modification of much that has been decided. If, for example, the common law's hostility toward combinations of workmen has reflected itself in decisions in which monopolizing policies of laborers are looked at with greater severity than like combinations among traders, modern legislation fairly construed may require exactly the opposite treatment. In the field of business combinations legislatures are declaring their views with freedom, and condemning many things. In each instance the condemnation means that the thing is declared a public danger — in other words, a nuisance *quoad* the evil which was feared. Doing such a thing is no longer legitimate business activity, and harm intentionally

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<sup>70</sup> *L. D. Wilcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 116.

<sup>71</sup> Pollock, *Torts*, 8 ed., 333.

inflicted by means of such conduct will be actionable, for the defendant's justification will fail. The rules of the fight have been changed by the final authority, and the field of competition has been cut down accordingly. In dealing with these cases the courts have no duty more important than a careful study of the whole statute law on the subject in order to extract from it the declared legislative policy. And whether that policy be enlightened or the reverse, its free acceptance will best preserve the dignity and power of the court.

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## SEQUEL TO WORKMEN'S COMPENSATION ACTS.

[Continued.]

IT may be contended that such of the Workmen's Compensation Acts as purport to apply only to extra-hazardous occupations are not incongruous with the modern common law of torts. This class of acts, it will be said, fall under (are applications of) the exceptional, but well-recognized, doctrine of absolute liability in cases of extra-hazardous uses or conduct. How much ground is there for this contention?

The fundamental general principle of the modern common law of torts is, that fault is requisite to liability. To this general principle the common-law courts have established (*inter alia*) the following exception — That one who makes extra-hazardous uses of property, or who indulges in extra-hazardous conduct, acts at peril and is absolutely liable, irrespective of negligence, for damage so occasioned.<sup>1</sup>

At the beginning of Workmen's Compensation legislation there was a tendency to confine the operation of the statute to certain specified occupations, which were regarded by a majority of the legislators as specially hazardous. At the present moment the drift is unmistakably in the opposite direction. A large majority of the most recent statutes are not restricted to those employments which might be considered extra-hazardous, but apply to nearly all manual occupations.<sup>2</sup> A brief survey of the history of Workmen's Compensation legislation clearly shows both the original tendency and the present inclination.

The initial English Act of 1897, 60 & 61 Vict., ch. 37, was admittedly an experiment. It applies only to certain specified occupations, most or all of which were probably deemed by a

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<sup>1</sup> This exceptional doctrine is regarded unfavorably by some high authorities. See Pollock on Torts, 6 ed., 467-8, 473-4, 623-4; 1 Street, Foundations of Legal Liability, 84, 85; and compare Bishop, Non-Contract Law, §§ 1225 and 1230; 2 Cooley, Torts, 3 ed., 696-7, 706-8. But we think that, for the present at least, there will be in every community some uses or conduct which the courts will hold to be extra-hazardous. These, however, will not be the same in all countries.

<sup>2</sup> Some exceptions which are frequently made are stated in a later note.

majority of the legislators to involve special hazard to workmen. It does not contain a requirement that the accident shall be due to one of those risks "which give to the business its extra-hazardous character." This earlier statute has been superseded by the Act of 1906, 6 Edw. VII, ch. 58, now in force. The framers of the later statute make no pretense of confining its operation to extra-hazardous occupations. It "imposes the duty of compensation upon the employer by reason of the mere relation of employment and of the connection of the injury with the employment, quite irrespective of the nature of the employment."<sup>3</sup> The Act of 1906 includes, *inter alia*, domestic service, ordinary farm work, and clerical labor. With some exceptions, it applies to all regular employees who work for wages.<sup>4</sup>

The various Workmen's Compensation Acts in the British Colonies differ widely from each other as to the kinds of occupation included; and so do such acts in countries other than the British Dominions and the United States.<sup>5</sup>

The Workmen's Compensation statutes enacted in the United States may be divided into two classes:

Class 1. Those which purport to confine their operation to extra-hazardous occupations.

Class 2. Those which make no pretense of restricting their application to extra-hazardous occupations.<sup>6</sup>

<sup>3</sup> Prof. Freund, 2 Report of U. S. Commission, 262; 2 Amer. Labor Legislation Review, 56.

<sup>4</sup> "'Workmen' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an out-worker, or a member of the employer's family dwelling in his house, but save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer whether by way of manual labour, clerical work, or otherwise, and whether the contract is express or implied, is oral or in writing." English Act of 1906, 6 Edw. 7, ch. 58, § 13. "Definitions."

<sup>5</sup> See summaries: 5 Labatt, Master and Servant, 2 ed., § 1803; Report of Massachusetts Commission on Compensation for Industrial Accidents, A. D. 1912, pp. 55-76.

<sup>6</sup> Statutes in Class 2, like those in Class 1, generally adopt the English provision excluding a person "whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business."

Some of the statutes apply only to those masters who regularly employ not less than a specified number of workmen; e. g. five or fifteen. In several states there are express provisions excluding farm and domestic service. In Rhode Island an employee,



If we look only at statutes enacted prior to 1913, the states are nearly equally divided between Class 1 and Class 2.<sup>7</sup> There were seven states in Class 1 and eight states in Class 2, if we include in Class 1 the New York Act of June 25, 1910, ch. 674, and in Class 2 the New York Act of May 23, 1910, ch. 352.<sup>8</sup>

The legislation enacted in 1913, prior to December 1, shows a very strong preponderance in favor of Class 2. Two states, Nevada and Illinois, changed from Class 1 to Class 2.<sup>9</sup> Seven

to come under the act, must be one "whose remuneration does not exceed eighteen hundred dollars a year." R. I. Law of 1912, ch. 831, Article V, § 1, Paragraph (b).

With the above exceptions, the statutes in Class 2 apply to nearly all occupations carried on by manual labor.

<sup>7</sup> We omit the Montana Act of March 4, 1909, ch. 67, which was *held* unconstitutional in 1911, in 44 Mont. 180, 221-222. It was a compulsory act for the creation of a state Insurance Fund for the benefit of coal miners and coal workers.

<sup>8</sup> Up to Dec. 31, 1912, the six following states had passed acts applying only to certain specified occupations, all of which were expressly declared to be extra-hazardous or specially dangerous: Arizona, Act of June 8, 1912, ch. 14. Illinois, Act of June 10, 1911, § 2 (since changed by Act of 1913, cited in later note). Kansas, Act of March 14, 1911, ch. 218. Nevada, Act of March 24, 1911, ch. 183 (since changed by Act of 1913, cited in later note). New Hampshire, Act of April 15, 1911, ch. 163. New York, Act of June 25, 1910, ch. 674 (*held* unconstitutional in *Ives v. South Buffalo R. Co.*, 1911, 201 N.Y. 271). With the above must be classed the state of Washington Workmen's Compensation Act, Laws of 1911, ch. 74, which purports to apply only to occupations which are deemed extra-hazardous. It enumerates a considerable number of occupations "intended to be embraced within the term 'extra-hazardous' wherever used in this act"; and then provides: "If there be or arise any extra-hazardous occupation or work other than those herein above enumerated, it shall come under this act. . . ." The Washington act was *held* constitutional in *State v. Clausen*, 1911, 65 Wash. 156.

Up to Dec. 31, 1912, the eight following states had passed acts which made no pretense of restricting their application to extra-hazardous occupations: California, Act of April 18, 1911, ch. 399 (and see Act of May 26, 1913, ch. 176). Massachusetts, Act of July 28, 1911, ch. 751. Michigan, Act of March 20, 1912, Act No. 10. New Jersey, Act of April 4, 1911, ch. 95. New York, Act of May 23, 1910, ch. 352. Ohio, Act of June 15, 1911, vol. 102, Ohio Laws, 524 (and see Act of March 14, 1913). Rhode Island, Act of April 29, 1912, ch. 831. Wisconsin, Act of May 3, 1911, ch. 50. Perhaps we ought to add the Maryland Act of April 15, 1912, Laws of 1912, ch. 837, which may be termed "an elective insurance act." In four of these states the constitutionality of the statute has been upheld by the court. Opinion of the Justices, 1911, 209 Mass. 607; *State v. Creamer*, 1912, 85 Ohio St. 349; *Martin, J.*, in *Seaton v. Newark Tel. Co.*, 1911, New Jersey Court of Common Pleas, 34 N. J. L. J. 368, and 35 *ibid.* 8; *Borgnis v. Falk*, 1911, 147 Wis. 327.

<sup>9</sup> Nevada, Act of March 15, 1913, Laws of 1913, ch. 111; Illinois, Laws of 1913, p. 335 *et seq.*, §§ 5 and 35. This act "covers not merely hazardous but all employments; though employers in non-hazardous employments not accepting the law do not lose their common-law defenses." "The Survey," vol. 20, p. 630. See Illinois Laws of 1913, p. 339, § 3 (a) and 3 (b).

states passed Workmen's Compensation Acts in 1913 for the first time. Of these seven, only one state, Oregon, took its place under Class 1.<sup>10</sup> The other six states come under Class 2.<sup>11</sup>

Taking the statutes now in force up to Dec. 1, 1913, Class 1 included only five states; viz., Arizona, Kansas, New Hampshire, Washington, and Oregon. To these, New York must now be added. See New York Act of Dec. 16, 1913, ch. 816; more fully stated *post*.

Class 2 includes at least fifteen states.<sup>12</sup> These fifteen states are: California, Connecticut, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, Ohio, Rhode Island, Texas, West Virginia, and Wisconsin.<sup>13</sup>

<sup>10</sup> Oregon, Act of Feb. 25, 1913, Laws of 1913, ch. 112, §§ 10, 13, 14, and 31. The Oregon Act was adopted by popular vote in November, 1913.

<sup>11</sup> Connecticut, Act of May 29, 1913, Laws of 1913, ch. 138, part B, § 43; and see also part A, § 2. Iowa, Act of April 18, 1913, Laws of 1913, ch. 147, § 1. Minnesota, Act of April 24, 1913, Laws of 1913, ch. 467, § 34, sub-sections *d* and *g*. Texas, Act of April 16, 1913, Laws of 1913, ch. 179, part IV, § 1; and see also Part I, § 2. West Virginia, Laws of 1913, ch. 10, § 52. Nebraska, Act of April 21, 1913, Laws of 1913, ch. 198, §§ 14 (2), 15 (2), and § 6 (1) and (2).

<sup>12</sup> Amer. Labor Legislation Review, p. 382, note 1, says: "The Nebraska Law was referred to the people for a vote in November, 1914."

The act itself contains no provision for submission to popular vote. Probably its operation was suspended by the filing of a referendum petition under article 3, sections 1 B and 1 C of the amended Constitution of Nebraska (printed on p. 6 of the volume containing Nebraska Laws of 1913). Assuming, perhaps rashly, that the act is likely to be approved by the voters, we have classified it with the statutes now in force in other states.

<sup>13</sup> There would be sixteen states if we also include the Maryland Act of April 15, 1912, ch. 837, which may be termed "an elective insurance act."

<sup>14</sup> In connection with Class 1, attention should be called to the constitutional amendment adopted in New York at the November election, 1913 (stated *ante*, p. 236, note 3), and to the statute subsequently enacted by the New York legislature.

The constitutional amendment was passed by the legislature at two successive sessions, in 1912 and 1913, and was then submitted to popular vote. The amendment empowers future legislatures to enact a far more sweeping statute than the Act of 1910, which was held unconstitutional. The compulsory Act of 1910 purported to apply only to certain extra-hazardous occupations. But the amendment, which two successive legislatures voted to submit to the people, contains no restriction of that sort; although, at a hearing before a legislative committee in 1912, such a restriction was advocated by a committee of the Bar Association. See vol. 36, Reports of New York Bar Association, 640, 641, 644.

Since the adoption of the constitutional amendment, New York has enacted a "Workmen's Compensation Law." Act of Dec. 16, 1913, ch. 816.

This act applies only to certain enumerated employments which are therein described as "hazardous."

"Section 2. *Application*. Compensation provided for in this chapter shall be



What is the question arising here as to the construction and effect of the statutes of the six states in Class 1? and why is this question material in the present discussion?

We have contended from the beginning of this paper that the ultimate result brought about by the Workmen's Compensation legislation is utterly incongruous with the result which would be reached under the modern common law of torts; and that hence the enactment of this legislation, assuming it to be both constitutional and just, will give rise to agitation for further changes in the law so as to put certain other persons upon an equality with workmen. But it has sometimes been supposed that the alleged incongruity does not exist in the case of *some* of the Workmen's Compensation Acts, which are believed to fall under a well-recognized exception to the general common-law rule; viz., the exceptional doctrine of absolute liability in cases of extra-hazardous uses or conduct. As to a large part (15 out of 21) of the states where Workmen's Compensation Acts are now in force, there is no color for such an argument. The framers of those acts make no pretense of confining their operation to extra-hazardous occupations. But there are six states, all of which are included in Class 1, *ante*, where the statutes purport to apply exclusively to hazardous occupations; and we have now to consider the construction and effect of these statutes. (We may also consider in this connection the initial English Act of 1897, which was

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payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:"

The statute then enumerates forty-two "Groups" of employments.

Section 3, paragraph 4, provides that "employee . . . shall not include farm laborers or domestic servants."

Section 3, paragraph 7: "'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom."

As to the "hazardous employments" enumerated in Section 2:

Group 32 includes *inter alia* the manufacture of boots and shoes.

"Group 37. Flax mills; manufacture of textiles or fabrics, spinning, weaving and knitting manufactories; manufacture of yarn, thread, hosiery, cloth, blankets, carpets, canvas, bags, shoddy or felt."

"Group 38. Manufacture of men's or women's clothing, white wear, shirts, collars, corsets, hats, caps, furs or robes."

Group 41, if we rightly construe it, enumerates among other "hazardous employments" the "operation" on highways of wagons drawn by horses.

probably regarded by many members of Parliament as applying only to extra-hazardous employments.)

The question is, whether the practical effect of these statutes is to allow recovery only in cases where it would have been allowed at common law under the exceptional rule as to extra-hazardous occupations.<sup>14</sup>

Some features of some of the occupations specified in this class of statutes might well be held, at common law, to be extra-hazardous as regards many of the workmen employed therein.<sup>15</sup>

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<sup>14</sup> We mean — "would have been allowed at common law," assuming that the doctrine of a workman's assumption of risk has been abolished.

<sup>15</sup> There are reported decisions as to whether certain occupations or certain uses of property should at common law be considered extra-hazardous toward outsiders, *i. e.*, persons not participating in carrying on the occupation or use. But there is a dearth of decisions as to what occupations or what uses of property should, at common law, be deemed extra-hazardous as to workmen employed therein. And the reason for such lack of authority is obvious. So long as the doctrine of voluntary assumption of risk prevailed, a damaged workman could not successfully base his claim on the specially dangerous nature of the business. Such a claim would have been met by the answer that, by entering into the employment, he had assumed all obvious risks inherent therein, no matter how great.

Undoubtedly it may sometimes be true that a business is specially dangerous to workmen employed therein, though it does not involve special risk to outsiders. But this is not invariably the case; and in regard to some occupations it would seldom be true. Hence the authorities as to what should, at common law, be deemed extra-hazardous toward outsiders are often entitled to weight in determining what undertakings should, at common law, be deemed extra-hazardous towards employees therein.

The extra-hazardous class is generally spoken of as if it were an exceptional class; and as including only a small proportion of cases as compared with the whole number of occupations and with all the various methods of using property. As a general rule, modern courts are not inclined to place an occupation in the extra-hazardous class, unless the danger is very much greater than in case of occupations in general.

While it is difficult to frame an affirmative definition of extra hazard, it is safe to assert (negatively) that certain circumstances do *not* constitute a test of extra hazard.

The test of extra hazard is not merely that there is a possibility of serious harm resulting. That is true of all occupations.

Nor merely that there is a probability of harm resulting from an occupation, unless it is conducted with reasonable care. That, again, is true of occupations in general.

Nor whether a particular occupation is a proper subject for police regulation; a subject as to which the legislature may prescribe rules in reference to the method of carrying it on. Any occupation, when carried on in an improper manner, may create special hazard. The legislature can and does regulate the speed at which horses may be driven in the public streets. But it cannot, therefore, be contended that the driving of a horse is an extra-hazardous business, either as regards the outside public or the driver himself. It is a reasonably safe occupation when properly conducted; *i. e.*, when conducted as it is in the great majority of cases.

Nor is the test whether a particular kind of business, or a particular method of



But these statutes, in effect, allow compensation in various cases where the recovery cannot be accounted for as an application of the common-law doctrine relative to extra-hazardous undertakings.<sup>16</sup> Such cases may be divided into two classes.

First: Where some occupations, which are included in some statutes upon the apparent theory that they are necessarily and always extra-hazardous towards workmen, are not so in their usual features, and are not generally so regarded.

Second: Where an occupation is extra-hazardous only as to certain parts or branches of the undertaking, and an accident occurs while the employee is working in the non-hazardous part. Here the statutes, taken literally, would allow recovery just as much as if the accident had been due to one of the specially dangerous features of the business; and there is a strong tendency to so construe them.

As illustrations of Class 1, reference may be made to statutes which assume that work in a factory is necessarily extra hazardous, or that the use of a steam boiler involves extra-hazard to all workmen in the vicinity, on account of the danger of explosion.

The statutes of five states in Class 1 all specify work in "factories" as one of the extra-hazardous occupations. And a "factory" is (in substance) described as a place where an undertaking is carried on by means of power-driven machinery. These statutes all practically declare that work in a factory is invariably of an extra-hazardous nature.<sup>17</sup> But there are factories and factories.

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using property, was extra-hazardous when it was first introduced. The question is, whether it is extra-hazardous as it is carried on to-day, with a better knowledge of possible dangers and improved methods of preventing accidents. "Modern methods have reduced the risk in many industries." See Mr. C. F. Randolph, in 2 Report United States Commission, 1425.

<sup>16</sup> These statutes generally contain a clause expressly declaring that all the occupations specified in the act are to be deemed extra-hazardous. How far this clause bears upon the special question under discussion in the article will be considered later.

<sup>17</sup> Arizona, Act of June 8, 1912, ch. 14, § 3, paragraph 10; Kansas, Laws of 1911, ch. 218, §§ 6 and 9; New Hampshire, Laws of 1911, ch. 163, § 1, paragraph (b); Oregon, Laws of 1913, ch. 112, §§ 13 and 14; Washington, Laws of 1911, ch. 74, §§ 2 and 3.

The remaining (or sixth) state in Class 1 is New York. The recent New York Act of December 16, 1913, does not say in general terms that all work "in a factory" is hazardous. But the forty-two "Groups" of "hazardous employments" there enumerated include various specified kinds of manufacturing, some of which we think would

In many instances the nature and the present methods of manufacturing are such that no extraordinary risk is involved, and accidents are not frequent. And this is true, not only of many small concerns, but also of many large ones.

To prove the necessity for a Workmen's Compensation Act, figures are often given showing the large number of serious accidents among persons employed in iron and steel manufacturing. But it should not be assumed that these figures fairly represent the average number of accidents in all other kinds of manufacturing. The Report, made in July, 1912, by the Massachusetts Commission on Compensation for Industrial Accidents, contains statistics of the accidents in that state for the year ending April 30, 1912.<sup>18</sup> Table IX, pp. 137-139, gives the number of accidents reported per 1000 employees in each of a large number of different industries. The average for all these industries was between 55 and 56 per 1000 employees. In iron and steel manufacturing the number per 1000 was 158.47. In textiles the number of accidents per 1000 employees was 33.87; little more than one-fifth of the number in iron and steel manufacturing. In the boot and shoe industry (now largely carried on with aid of machinery) the number was 16.47; only a little more than one-tenth of that in iron and steel manufacturing.<sup>19</sup> We do not think that the ordinary textile industries or the boot and shoe industry, as now carried on in factories with modern methods and safeguards, should be deemed "extra-hazardous" within the common-law meaning of that term.

Statistics show a great difference among the various industries, not only as to the whole number of accidents but also as to the number of fatal accidents. The Massachusetts Report states that the highest death-rate (4.60 per 1000 employees) is in "the non-manufacturing sub-group under light machinery and electric technical works, including linemen," etc. The Commission says:

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not now be regarded as "hazardous" within the common-law meaning of that term. See *ante*, note 13, as to Groups 32, 37, and 38.

<sup>18</sup> "It is probable that these rates are only approximately correct." A considerable number of the smaller establishments failed to make reports; but the rates given in the state Report seem to furnish a fair basis for comparison. See Report of Massachusetts Commission, A. D. 1912, pp. 119-122.

<sup>19</sup> See Report, 137-139, 129, 121.



"It should be noted that this death-rate is more than ten times as great as that for all industries taken together." Mass. Report, 121.<sup>20</sup>

The New Hampshire Workmen's Compensation Act is apparently framed upon the theory that the use of a steam boiler in a building involves extra-hazardous risk to all persons employed in its proximity, on account of the danger of explosion.<sup>21</sup>

According to the present common law of this country the use of a steam boiler is not extra-hazardous; and the owner is not liable to his neighbor or his employee for damage resulting from a boiler explosion, unless he is proved to have been negligent. When a steam boiler was a new thing and its use a novel experiment, the law might, not improbably, have been held otherwise. If the boiler of Robert Fulton's steamboat "Clermont" had exploded during its trial trip on the Hudson River in 1807, the inventor

<sup>20</sup> The following figures, as to seven groups of industries, are given in reports on the working of the British Workmen's Compensation Act.

(For 1909, see vol. 2, Report U. S. Commission, 1430. For 1911, see vol. 21, Board of Trade Labour Gazette, pp. 7 and 8.)

	For A. D. 1909	For A. D. 1911
Whole number of employees (exceeding) . . . .	6½ millions	7¼ millions
Number under the heading "factories" . . . .	4½ millions	nearly 5½ millions
Taking the seven groups together, the annual charge for compensation averaged for each person employed . . . . .	A.D. 1909 6s. 10d.	A.D. 1911 8s. 5d.
Average rate per person in each group:		
In factories . . . . .	3s. 5d.	4s. 6d.
In railroads . . . . .	7s. 1d.	7s. 11d.
In quarries . . . . .	9s. 2d.	10s. 9d.
In shipping. . . . .	10s. 8d.	14s. 3d.
In Constructional work . . . . .	14s. 11d.	13s. 5d.
In Docks . . . . .	16s. 8d.	21s. 9d.
In Mines . . . . .	20s. 1d.	23s. 8d.

The above tables do not give the number or percentage of accidents in each of the different varieties of factories. We think it would be found that a large percentage of accidents (*i. e.*, "large" in proportion to the whole number of persons employed in a particular industry) occur in a few special kinds of manufacturing, in which the risk far exceeds that in ordinary factories. Some special varieties of manufacturing might justly be deemed extra-hazardous, in comparison with the risk in ordinary manufacturing.

<sup>21</sup> "All work necessitating dangerous proximity to . . . any steam boiler owned or operated by the employer, provided injury is occasioned by the explosion of any such boiler. . . ." New Hampshire Laws of 1911, ch. 163, § 1.

would, very likely, have been held to be acting at his peril, and hence absolutely liable to persons damaged, irrespective of negligence on his part. But this was not the view entertained sixty-six years later, after particular kinds of danger had become known, and methods of guarding against these dangers had come into general use. In 1873 the New York court *held*, in accord with the general United States doctrine, that the owner of an exploded stationary boiler was not liable unless proved negligent.<sup>22</sup>

Apart from exceptional cases, the use of a steam boiler is not, in modern American common law, regarded as extra-hazardous. The owner is not held liable for damage resulting from the explosion of the boiler, unless he is proved negligent. There is some controversy as to whether the fact of explosion furnishes evidence upon which a jury *may*, if no explanation is offered, find that the owner was negligent. But this relates only to the manner of proving negligence; and, although proof that the boiler exploded might, in some courts, justify the judge in refusing to nonsuit the plaintiff, yet the jury are not, by such proof, compelled to find as a fact that the defendant was negligent.<sup>23</sup> And the doctrine — that in a case of boiler explosion a defendant is not liable unless the jury finds as a fact that he was negligent — governs, not only as between the boiler owner and a stranger or a neighbor, but also as between the boiler owner and his own servant.<sup>24</sup> Courts, in upholding this general doctrine, lay stress upon the frequency with which boilers are used, and the rarity of explosions as compared with the whole number of boilers in use.<sup>25</sup>

In December, 1911, there were upwards of twenty-four thousand steam boilers in Massachusetts which were subject to the provisions of the boiler inspection law. Only three steam-boiler explosions occurred in that state from October 1, 1907, to December 1, 1911. Apparently only one of these three exploding boilers had been

<sup>22</sup> *Losee v. Buchanan*, 1873, 51 N. Y. 476. See also *Marshall v. Welwood*, 1876, 38 N. J. L. 339.

<sup>23</sup> See *Walker, J.*, in *Stewart v. Van Deventer Carpet Co.*, 1905, 138 N. C. 60, p. 66.

<sup>24</sup> See *L. & N. R. Co. v. Allen*, 1885, 78 Ala. 494, 501; *Voigt v. M. P. C. Co.*, 1897, 112 Mich. 504; *Kramer v. Willy*, 1901, 109 Wis. 602; and *Cavanaugh v. Haven Coal Co.*, 1908, 222 Pa. St. 150.

<sup>25</sup> See *Bradbury, C. J.*, in *Bradford Glycerine Co. v. St. Mary's Woollen Mfg. Co.*, 1899, 60 Ohio St. 560, pp. 572-3; *Birrell, C. J.*, in *Bishop v. Brown*, 1900, 14 Col. App. 535. P. 547.



inspected; and the explosion of this inspected boiler was caused by the engineer's screwing down the safety valve to a pressure more than three times the pressure allowed by the state inspector on this boiler. In the report of an inquest held after the explosion, the District Judge said: ". . . I am informed that, out of the 39,572 boilers inspected by the department since 1893, this is the only boiler that has exploded."<sup>26</sup>

We said *ante*, p. 350, that the Workmen's Compensation Acts purporting to limit recovery to damages incurred in extra-hazardous occupations really allow recovery in two classes of cases outside of that limit. We have just been dealing with Class 1, where some of the occupations specified in the statute are not, as to their usual features, extra-hazardous. Now we come to Class 2.

Class 2. Where a specified occupation is extra-hazardous only as to certain parts or branches of the undertaking, and an accident occurs while the employee is working on the non-hazardous part. The statutes do not, in terms, purport to confine the remedy to accidents due to the extra-hazardous features or branches of the business.<sup>27</sup> Such statutes are generally construed as allowing a remedy for an accident occurring in that part of the employment which does not involve extra hazard, just as fully as for an accident due to one of the specially hazardous features of the business. The statute is construed as allowing a remedy for accidents which might have happened just the same in a business which did not involve any extra-hazardous features.

The initial English Act of 1897 (now superseded by the broader Act of 1906) applied only to certain specified occupations, which were not expressly described as extra-hazardous, but which are supposed to have been selected on the theory (whether correct or

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<sup>26</sup> Mr. McNeill, Chairman of the Massachusetts Board of Boiler Rules, in 1 *Amer. Labor Legislation Review*, pp. 78, 79.

<sup>27</sup> In two states where the original Workmen's Compensation Acts applied only to alleged extra-hazardous occupations, the original acts contained special provisions which may have been intended to prevent recovery for accidents not due to the specially hazardous features of the business. See Illinois Act of June 10, 1911, §§ 21, 22; New York Act of 1910, ch. 674, § 217 (a). These original Illinois and New York acts are no longer in force; but provisions of a somewhat similar nature are contained in the Arizona Act of June 8, 1912, Laws of 1912, Second Session, ch. 14, § 2; and see Constitution of Arizona, Article XVIII, § 8. Compare Washington Act of March 14, 1911, ch. 74, § 27.

incorrect) that they were all especially dangerous. It would have been possible for the courts to hold that this statute was intended to give a remedy only for such accidents as were due to the extra-hazardous features of the business. But this view was not adopted by the British courts. On the contrary, they construed the Act of 1897 as imposing absolute liability for accidents occurring in all parts or branches of the general undertaking, including the non-hazardous parts as well as the parts involving special danger.

The English Act of 1897 applies to employment "on or in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished. . . ." In *Maude v. Brook*, L. R. (1900), 1 Q. B. 575, a workman engaged in plastering a new house fell from the landing at the top of the stairs and was killed. He was not using a scaffolding, nor was there any scaffolding in his immediate vicinity, but in other parts of the house other workmen were using an arrangement which was held to be a scaffolding. *Held*, that the widow of the deceased could recover, because the building was being constructed "by means of a scaffolding," although the accident was in no way connected with the scaffolding. *Rigby*, L. J., p. 580: ". . . I think it is not necessary that the accident should have happened by reason of the scaffolding — that is, it need not involve the falling of any one or anything on or from the scaffolding; if we once get a house being constructed by means of scaffolding, any accident happening to a workman employed by the undertakers upon that building would be within the act." In *Halstead v. Thomson*, 3 Scotch Session Cases, 5th Series (1900-1901), 668, recovery was allowed under the above clause in the Act of 1897, although no scaffolding was in use, or even erected, at the time of the accident. A scaffolding had been used before the accident and was used again after the accident; but at the date of the accident the materials of which it was composed were on the ground and not set up.<sup>28</sup>

As to some American Workmen's Compensation Acts an argument in favor of restricted construction finds more support in the language of the statute than in the case of the English Act of

<sup>28</sup> See also *Middlemiss v. Middle*, etc. Committee, 2 Scotch Session Cases (1899-1900), 5th Series, 392; *Blovelt v. Sawyer*, L. R. [1904], 1 K. B. 271, and Prof. Bohlen's comments in 25 HARV. L. REV. 524.



1897. These American statutes apply only to certain specified occupations, which are expressly declared to be extra-hazardous; and the existence of special hazard is practically given as the reason for enacting such legislation. Take, for instance, § 215 of ch. 674, New York Laws of 1910.<sup>29</sup>

"This act shall apply only to workmen engaged in manual or mechanical labor in the following employments, each of which is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessarily or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen" (then specifying eight kinds of employment).

It could be argued with some plausibility that a legislature using the above language did not intend to allow recovery for accidents which were not due to the specially hazardous features of an occupation.<sup>30</sup>

But the chances are very much against the adoption of such a view by the courts. The interpretation given by British courts

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<sup>29</sup> This provision, in substance, has been inserted in the statutes of several states. As heretofore mentioned, the New York act was *held* unconstitutional in *Ives v. South Buffalo R. Co.*, 1911, 201 N. Y. 271.

<sup>30</sup> "If the object is to make employers who choose to engage in ultra-hazardous businesses answer for the injury caused to their employees by the exceptional nature of their business, there seems no good reason to hold them answerable for injuries due not to those exceptional risks, but to risks which would attach to any workman working in any business. On the other hand, there seems no particular justice in giving compensation to one workman because he is employed in a business which subjects him to peculiar dangers which have in fact not injured him, and to deny it to another injured in precisely the same way simply because, while his employment did subject him to the risk of the very nature from which he suffered, it did not also subject him to peculiar risks of a totally different sort, thereby becoming ultra-hazardous. If the act singles out servants in certain trades, because of the peculiar risks to which these trades subject them, as worthy of protection not granted other servants in less hazardous employment, it would seem a fair construction of the legislative intent that they were intended to be protected not from the risks which they ran as workmen and to which all workmen in any employment are subject, but only from those risks which were peculiar to their exceptional employment."

Prof. Bohlen, 25 HARV. L. REV. 521, discussing the meaning of the requirement in both the English acts (1897 and 1906), that the injury to be compensated must be one "arising out of the employment." Compare *Indianapolis, etc. Co. v. Kinney*, 1908, 171 Ind. 612, 617-621.

to the English Act of 1897 is likely to exert great influence upon American judges. And this construction is practically followed in the Report of the United States Employers' Liability and Workmen's Compensation Commission, and also in a recent decision of the Supreme Court of the United States.

The "United States Employer's Liability and Workmen's Compensation Commission," when making their report on February 2, 1912, submitted the draft of a proposed bill; providing (*inter alia*) for compensation to "any employee" of an interstate railroad for accident arising out of and in the course of his employment.<sup>31</sup> This would include employees not engaged in the actual operation of trains, or subject to any of the special hazards peculiar to railroad employment; *e. g.*, it would include a ticket-seller or a clerk in the treasurer's office. The learned Commissioners in their Report<sup>32</sup> argue that the proposed statute is "not objectionable because including employees not engaged in the hazardous part of employment." They say: "The fact that every employee is not subject to these dangers is immaterial." They virtually assert that the justice and the constitutionality of the statute are not affected by this fact.<sup>33</sup>

A similar view is taken by the United States Supreme Court in Second Employer's Liability Cases, 223 U. S. 1, decided Jan. 15, 1912. The court (see page 52) sustained a statute imposing liability for the benefit "of all employees" of "carriers by railroad who are employed in interstate commerce"; although some of them "are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those to which other employees in such commerce, not within the act, are exposed."<sup>34</sup>

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<sup>31</sup> Report of United States Commission, vol. 1, p. 107 *et seq.*

<sup>32</sup> Vol. 1, pp. 50, 51.

<sup>33</sup> The Report cites *Louisville, etc. R. Co. v. Melton*, 1910, 218 U. S. 36; and *Mobile, etc. R. Co. v. Turnipseed*, 1910, 219 U. S. 35, 40. But see *Indianapolis, etc. Co. v. Kinney*, 1908, 171 Ind. 612, 617-621; and compare 218 U. S. 36, p. 57.

Mr. C. F. Randolph regards the court in the Melton case as saying, in effect, that the power to impose upon railways "a singular liability because of their singular hazard is not limited to workmen in the hazardous side of their business, but applies to all their employees." 2 Report United States Commission, 1457.

<sup>34</sup> As to the power of Congress to classify, Van Devanter, J., said, p. 52: The constitution does not "condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in



A similar rule seems prescribed in the recent Oregon statute.<sup>35</sup>

The immediate question here is *not* whether a statute imposing absolute liability for pure accident occurring in the non-hazardous part of an employment is within the constitutional power of the legislature. The immediate question here is *not* whether the result reached under such a statute is preferable to the result reached under the common-law rule. Instead, our immediate question here is, whether the result reached under the statute is the same result which would have been reached at common law; whether there is incongruity between the two results.

As to those Workmen's Compensation Acts which purport to apply only to extra-hazardous occupations, the framers of such acts will deny that this legislation constitutes a radical departure from the modern common law of torts. On the contrary, they will contend that this legislation falls within a well-recognized common-law exception to the general common-law rule; viz., the doctrine that a man carrying on an extra-hazardous business does so at his peril, and is absolutely liable for damage occurring entirely irrespective of fault.

We have now attempted to show that the foregoing contention is untenable; so far at least as relates to a considerable portion of the accidents covered by such statutes (as construed by the courts).

And this for one or the other of the following reasons: Either, first, because some occupations included in some of these statutes would not, as to their usual features, have been regarded at com-

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classifying according to the general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary."

<sup>35</sup> "All persons, firms and corporations engaged as employers in any of the hazardous occupations hereafter specified shall be subject to the provisions of this act; . . . provided, however, that where an employer is engaged in a hazardous occupation, as hereinafter defined, and is also engaged in another occupation or other occupations not so defined as hazardous, he shall not be subject to this act as to such non-hazardous occupations, nor shall his workmen wholly engaged in such non-hazardous occupations be subject thereto except by an election as authorized by section 31 thereof; provided, however, that employers and employees who are engaged in an occupation partly hazardous and partly non-hazardous shall come within the terms of this act the same as if said occupation were wholly hazardous. . . ." Oregon Act of Feb. 25, 1913, ch. 112, § 10.

mon law as extra-hazardous; or, second, because at common law the courts would not have held that an accident to a workman in the non-hazardous part of an employment involved the absolute liability of the employer just as much as if the accident had been due to the specially hazardous features of the business.

Hitherto we have not taken into account the clause found in some of the American Workmen's Compensation Acts, which expressly declares, or asserts, that all the occupations specified in the act are, or are to be deemed, extra-hazardous.<sup>36</sup> As an example of such legislation, we give the New York Law of 1910, ch. 674, § 215 (also quoted on another page):

"This article shall apply only to workmen engaged in manual or mechanical labor in the following employments, each of which is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessary or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen" (then specifying eight kinds of employment). Compare Session Laws of the State of Washington, A. D. 1911, ch. 74, §§ 1 and 2.<sup>37</sup>

In most of the states one principal purpose of inserting such a declaration as the one contained in the New York act was, to get over certain apprehended constitutional objections; among others, the objection that the legislature cannot overturn the fundamental doctrine of the modern common law of torts. The framers of the act intended to claim (*inter alia*) that the legislative declaration — that all the specified occupations are extra-hazardous — brings

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<sup>36</sup> See Constitution of Arizona, Article XVIII, § 8: "The legislature shall enact a Workmen's Compulsory Compensation Law applicable to workmen engaged in manual or mechanical labor in such employments as the legislature may determine to be especially dangerous. . . ."

<sup>37</sup> The Workmen's Compensation Acts of some countries are made applicable, not only to certain specified occupations, but also to such other occupations as may hereafter be declared by executive authority to be dangerous. See Western Australia, Act of Feb. 19, 1902, New South Wales, Laws of 1910, No. 10; Belgium, Act of Dec. 24, 1903; summarized in 5 Labatt, Master and Servant, 2 ed., § 1803, and in Report of Massachusetts Commission on Compensation for Industrial Accidents, A. D. 1912, pp. 75-76, 65, 67.



the case within a well-recognized exception to the general common-law doctrine.

If the validity of this method of obviating constitutional objections were a subject for present consideration, it might be suggested that there is certainly some limit to the legislative power of classification or definition.<sup>38</sup>

A classification cannot be supported if it is clearly arbitrary and based on no reason whatever.<sup>39</sup> Suppose that the legislature enacts that ordinary domestic service, such as sweeping a room, or ordinary farm labor carried on without the use of machinery, such as hoeing potatoes, is extra-hazardous. Such an enactment can hardly preclude a court from holding the contrary. *A fortiori*, such a drag-net statute as was proposed (but not enacted) in Minnesota would be ineffective. The bill there proposed (see 6 Illinois Law Review, 255-256) provided "that every employer in the state of Minnesota conducting an employment in which there hereafter occurs bodily injury to any of the employees arising out of, and in the course of, such employment, is, for the purpose of this act, hereby defined to be conducting a dangerous employment, and conse-

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<sup>38</sup> Has an American legislature constitutional power to classify according to the relative poverty or wealth of the injured employees? Can they enact that, under the same state of facts, a poor man can, and a well-to-do man cannot, recover compensation? Such seems to be the distinction made in the Rhode Island Act of 1912; suggested, perhaps, by a provision in Section 13 of the English Act of 1906, which, however, was passed by a legislative body not hampered by constitutional restriction.

The Rhode Island Act of April 29, 1912, Article V, § 1, paragraph (b), says: "'Employee' means any person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer, and whose remuneration does not exceed eighteen hundred dollars a year." In most of the American Workmen's Compensation Acts the compensation allowed to each injured workman is proportioned to the amount of wages received by him. The Rhode Island statute *might* have provided that every injured workman should receive a certain percentage (say, for example, fifty per cent) on that part of his wages which did not exceed eighteen hundred dollars, but no percentage on the excess of his wages over and above eighteen hundred. Under such a provision, if A.'s annual wages amount to \$1800.00 and B.'s annual wages amount to \$1900.00, each, if damaged, would have received fifty per cent on \$1800.00; viz., \$900.00. But this would not be the effect of the Rhode Island statute as actually framed. Under it, in the case supposed, A. would receive \$900.00, while B. would receive nothing.

Would a classification dependent upon color, or race, or membership in a particular organization be constitutional? The Transvaal Act of August 20, 1907, allows recovery to a "workman" only when he happens to be a "white person." See Transvaal Statutes, 1907; Act No. 36, p. 242.

<sup>39</sup> See 6 Illinois Law Review, 255; Freund on Police Power, § 738.

quently subject to the provisions of this act, and entitled to the benefits thereof."

But whether constitutional objections can be obviated by a legislative declaration, such as the one in the New York act, is a question with which we are not now concerned. This article has proceeded throughout on the assumption that the modern Workmen's Compensation Acts are to be regarded as constitutional (all difficulties, if any, being removed by constitutional amendments). After making this assumption and also assuming that justice to workmen requires the passage of a Workmen's Compensation Act, the question for discussion was presented in these terms: "Does not justice require a further change in the law, so as to put persons other than workmen upon an equality with workmen?" In other words, the question raised is, Will not such legislation in favor of workmen lead to a movement in favor of further changes in the law, in order to remove the incongruities which would otherwise exist, between the results reached under the statute in regard to accidents to workmen and the results reached at common law in regard to accidents to persons other than workmen?

What is the legal effect of this legislative declaration as to the extra-hazardous nature of certain occupations? To what class of persons does it relate, and how far does it purport to go?

Literally, it is a declaration that certain occupations are to be deemed extra-hazardous as to workmen engaged therein. But it does not say that these occupations shall invariably be deemed extra-hazardous towards workmen, entirely irrespective of the nature of the proceeding before the court. We think that the declaration as to the extra hazard of these occupations will be effective only in proceedings brought under the statute by workmen to obtain the statutory compensation.

Suppose that judges, in their anxiety to avoid a conflict with the legislature, should hold that such a legislative declaration is conclusive upon the court (upon the judicial branch of the government) when passing upon the question of the constitutionality of the statute. Does this judicial holding compel the general public to adopt, for all purposes, the opinion entertained by the legislature as to the extra-hazardous nature of the specified occupations? Does it prevent the general public from regarding the statute as bringing about a result totally irreconcilable with the fundamental



principle of the modern common law of torts? Does it prevent the general public from thinking that the rule thus established as to workmen is inconsistent with the existing law (which the statute does not purport to change) as to the rights of damaged persons other than workmen? Suppose that, as to some features of the occupations specified in a Workmen's Compensation Act, the courts, before the enactment of such a statute, would have held that, at common law, they were not extra-hazardous either as to workmen or as to outsiders; and that this view would have been generally entertained by reasonable men. Then the statute, which imposes absolute liability to workmen, and to workmen only, has the practical effect of putting workmen in a better position than outsiders; the effect of giving workmen a special protection to which some now unprotected persons have an equally meritorious claim. Such legislation might come to be regarded by the general public as presenting an instance of unjustifiable incongruity; and its enactment would be likely to ultimately lead to an agitation for such further changes in the law as would put outsiders, when damaged by the non-culpable conduct of a business, upon an equality with workmen employed in that business. Can this movement for further change in the law be successfully met and suppressed by the argument that the legislature has changed the nature of these occupations (so far as workmen are concerned) by a declaration that they are in law what they are not in fact?<sup>40</sup>

We have now been giving a good deal of space to discussing the

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<sup>40</sup> "It is beyond even the power of the legislature to make that a party wall which is not a party wall. No doubt they might have made provision to the effect that that which is not a party wall shall, for the purposes of a particular act of Parliament, be deemed to be a party wall; but they cannot make what is not a party wall a party wall, any more than they can make a square a circle." James, L. J., in *Weston v. Arnold*, [1873] L. R. 8 Ch. App. 1084, p. 1089. "... it is not possible for any legislature to make that a fact which is not a fact." Green, J., in *Appeal of Edwards*, 1885, 108 Pa. St. 283, 290.

See *Bell, J.*, in *State v. Canterbury*, 1854, 28 N. H. 195, 228; *State v. Adams*, 1872, 51 N. H. 568, 570.

As to the effect of the statute in the above respect, it can make no difference whether the legislature was acting under a general grant, by the constitution, of legislative power; or (as in Arizona) under a command, expressly given by the constitution, to legislate upon the subject-matter in question. In either case, the legislative declaration may govern in proceedings brought to enforce the statute. But under no other circumstances are persons compelled to regard that as hazardous which is really non-hazardous.

construction and effect of the six American Workmen's Compensation Acts which purport to apply only to hazardous occupations. But it is quite possible that the subject we have just been specially considering will soon cease to have any practical importance. It is not improbable that, a few years hence, there may be no statutes of this description in force. The present tendency is very strong to make Workmen's Compensation Acts include most manual occupations, instead of limiting their application to extra-hazardous employment. Such a limitation is found in only six of the twenty-one state statutes now in force.<sup>41</sup>

Of what has heretofore been said this is the sum: The result reached in many cases under the Workmen's Compensation Acts is absolutely incongruous with the results reached under the modern common law as to various persons whose cases are not affected by these statutes. For this difference there is no satisfactory reason.

It is believed that the incongruities heretofore pointed out, resulting from the difference between the statute and the modern common law, will not be permitted to continue permanently without protest. The public are not likely to be "content for long under these contradictory systems." In the end, one or the other of the two conflicting theories is likely to prevail. There is no probability, during the present generation, of a repeal of the Workmen's Compensation Acts. Indeed, the tendency is now in the direction of extension, rather than repeal, of this species of legislation.<sup>42</sup> The only present available method to remove the inconsistency is by bringing about a change in the existing common law, either by legislation or by judicial decisions.

As to legislation (aided perhaps by constitutional amendments); there may be an attempt to bring about State Insurance, not confined to harm suffered by hired laborers.<sup>43</sup> It may extend to an "outsider," who suffers harm from the non-culpable conduct of

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<sup>41</sup> As to the Nebraska act, see *ante*, note 11.

<sup>42</sup> "Legislation of this character is in its infancy. . . ." Smith, J., in Cunningham v. Northwestern Improvement Co., 1911, 44 Mont. 180, 211.

<sup>43</sup> See Holmes, Common Law, 96.



persons carrying on a business in which he is not a participant.<sup>44</sup> It may not be confined to the case where there is, in the chain of antecedents, the non-culpable conduct of some human being other than the damaged person himself. It may include the case of an independent workman, who is hurt by pure accident, without any human agency other than his own, while conducting his own business on his own account; *e. g.* a small farmer, or a blacksmith who runs his forge without an assistant.<sup>45</sup>

A State Insurance Law may not merely insure against accident, but also against disease, either contracted in the service of another or while the claimant was working on his own account.

It may include damage wholly due to a natural cause, such as a stroke of lightning.<sup>46</sup>

<sup>44</sup> See illustrations *ante*, as to trolley car.

<sup>45</sup> In support of Workmen's Compensation legislation stress has been laid on the justice of "making every one who consumes any product of labor for hire pay his proportionate amount of the cost of the creation representing the personal injury misfortunes of those whose hands have enabled him to secure the objects of human desire, thus minimizing the sufferings which are the natural incidents of industry and should be borne, so far as they represent pecuniary sacrifice, by the mass of mankind whose desires are administered to by such industry." See Marshall, J., in *Borgnis v. Falk Co.*, 1911, 147 Wis. 327, 381.

But why confine relief to labor *for hire*, in the literal sense of that term? Why not include the farmer who is accidentally hurt while raising on his own land, exclusively by his own labor, a crop which is to be sold for consumption? Of course it might be difficult, in the absence of State Insurance, to provide a method of compensating him. He has no employer who could be made the primary paymaster. But if a general system of State Insurance is adopted, and accidental harm occurs to a farmer while engaged in the production of crops for sale and consumption, why should not relief be afforded him equally with a hired workman? And why should relief be restricted to cases where the crop is sold to an outside consumer? Why not give relief where the crop is intended to be consumed by the farmer's own family, and to thus prevent his family from becoming a public charge under the pauper laws?

The farmer's case presents two of the elements especially urged in favor of providing compensation for hired workmen, *viz.*, he was hurt while pursuing a legitimate industry; and he was in no way culpable. He may often be better able pecuniarily to bear the loss than a workman in a factory. But in many cases an accident occasioning total physical disability would ultimately reduce him to poverty. If an accidentally injured hired workman is saved from going to the almshouse by legislation giving him a remedy against a faultless employer, why should not an accidentally injured farmer be allowed relief by, or under, a system of State Insurance?

<sup>46</sup> The British "National Insurance Act" of Dec. 16, 1911, 1 & 2 George 5, ch. 55, bears the following title: "An Act to provide for Insurance against Loss of Health and for the Prevention and Cure of Sickness and for Insurance against Unemployment, and for Purposes incidental thereto."

Under this statute, sometimes called Lloyd-George's Act, the funds to pay insur-

Whether legislation of the above descriptions *ought* to be enacted is a question upon which no opinion is here intimated. Our immediate point is, that the present Workmen's Compensation legislation will inevitably give rise to a plausible agitation for such further legislation.

As to a change in the common law, to be brought about by judicial decisions:

There may be an attempt to induce judges to repudiate the fundamental doctrine of the modern common law of torts that fault is generally requisite to liability, and to go back to the ancient common-law doctrine that an innocent actor must answer for harm caused by his non-culpable conduct.

Or the judges may be urged to adopt a middle or compromise view; that, as between two non-culpable actors, the loss shall be equally divided.<sup>47</sup>

Several questions arise:

1. Can the judges change the law?
2. Ought they to change the law?
3. Will they change the law?

The objection may be raised that judges cannot make, or change, law; not merely that they cannot alter statute law, a result which is admittedly beyond their power; but that they cannot make or alter law on subjects not dealt with by the legislature.

There are at least three different theories as to judicial law-making.<sup>48</sup>

1. That judges cannot "make" law; that they merely discover and apply law which has always existed.<sup>49</sup>

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ance are derived partly from employers and employees; and partly, as we understand it, from moneys provided by Parliament. See Statutes for year 1911, p. 338, part 1, § 3.

<sup>47</sup> "Doubtless, as the law now stands, *Holmes v. Mather* and *Stanley v. Powell* were correctly decided. But is it possible to believe that such decisions represent the last word in human justice, or that an application of some such principles as insurance or division of loss would not have been more in accordance with enlightened jurisprudence, and more satisfactory to the public conscience?"

Digest of the English Civil Law, by Edw. Jenks *et als.*, Book 2, part 3, preface, p. xv. Compare Prof. Whittier, 15 HARV. L. REV. 335, quoted *ante*.

<sup>48</sup> See 60 Univ. Pa. Law Rev., 466-467.

<sup>49</sup> See Mr. James C. Carter's posthumously published work, "Law, Its Origin, Growth and Function."



2. (A middle view.) That judges can and do make new law on subjects not covered by previous decisions; but that judges cannot unmake old law, cannot even change an existing rule of "judge-made" law.<sup>50</sup>

3. That judges can and do make new law; and also can and do unmake old law; *i. e.*, law previously laid down by themselves or by their judicial predecessors.<sup>51</sup>

We prefer the third view. But if the second view is adopted, the result here would not be to sustain and preserve unaltered (unless by legislation) the common law as declared by the courts in A. D. 1900; but, instead, to sustain the law as formerly declared in A. D. 1400 by the judges of that day. If judges have no power to change (*i. e.*, if they cannot change) law "made" by their judicial predecessors, then, of course, they have not legally done that which they had no legal power to do (that which they could not do). Hence it would follow that the common law of 1400 is still in force; and that the decisions in more recent times, purporting to establish a contrary rule (*i. e.*, the rule now known as the modern common-law doctrine), are simply instances of judicial usurpation.

But, as already intimated, we prefer the third view, that judges can and do make new law and unmake old law. Under this view the judges have heretofore changed the law of A. D. 1400 to the law of A. D. 1900, and still have now the power to change it back again. Assuming, then, that the judges can turn the hands of the legal clock back five centuries, the questions remain:

Ought they to make the change?

Will they make the change?

As to whether the change will be made: it is safe to say that, while it may take place, yet it is not likely to be done directly and avowedly. When courts change the substantive law, they generally do so very gradually, and often attempt to conceal (or perhaps unconsciously conceal) the fact of change by using various "fiction phrases."<sup>52</sup>

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<sup>50</sup> See Prof. A. V. Dicey, in "The Relation between Law and Public Opinion in England," ch. XI, and more fully in the Appendix, pp. 481-493.

<sup>51</sup> See Prof. John C. Gray, in "The Nature and Sources of the Law," §§ 215-231, 465-512, 545-550, 628-636.

<sup>52</sup> See 60 Univ. Pa. Law Review, 466.

Judges, however, are not insensible to public opinion; and legislation, evidencing public opinion, has a reflex action on courts.<sup>53</sup>

Even if courts should shrink from directly and avowedly changing the law, the result could be, to a considerable extent, accomplished by indirect methods. By a very liberal construction of the *res ipsa loquitur* doctrine; by a broad view as to what constitutes *primâ facie* evidence of negligence; and by inverting the burden of proof (putting on defendant the burden of proving that he was not negligent),—the court could go far towards practically reversing the common law of A. D. 1900 in a large proportion of cases.

Whether this change *ought* to be made (whether it is expedient for either courts or legislatures to make it) is a problem of immense importance, which we here make no attempt to solve. At the very beginning it was said: "The object of this paper is to give notice of an impending question of great importance; not to give an answer to the question, but to show how and why it arises at the present time."

The aim has been to bring out distinctly the exact question, and to show that it must be met and cannot be evaded. How it should be answered is a matter not to be dealt with here.

At the outset, it was assumed for present purposes that the basic principle of the Workmen's Compensation Act is just; that justice to workmen requires the enactment of such a statute.

We have now attempted to show that, if justice to workmen requires such an enactment, then justice to certain persons other than workmen must also require similar legislation for their benefit; in other words, that the benefit of legislation on this basic principle cannot justly be confined to workmen.

We have also attempted to show that, if the above positions are correct, then the common law of A. D. 1900 is wrong in principle and ought to be repudiated.

But our temporary assumption — as to what justice to workmen requires — will probably be disputed by many lawyers, when it is sought to push the consequences of this assumption to its logical result.

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<sup>53</sup> See Lord Hobhouse, in *Smart v. Smart*, L. R. [1892], Appeal Cases, 425, pp. 434, 435, 436; Hoar, J., in *Amory v. Meredith*, 1863, 7 Allen (Mass.) 397, p. 400; Bell, J., in *Coffin v. Morrill*, 1851, 22 N. H. 352, p. 357; Bell, J., in *Jewell v. Warner*, 1857, 35 N. H. 176, p. 183; *State v. Franklin Falls Co.*, 1870, 49 N. H. 240, pp. 256-257.



Without indicating our own view as to the intrinsic justice, either of the Workmen's Compensation legislation or of the common law of A. D. 1900, it seems safe to say that the basic principles of the two are irreconcilable. They cannot both be wholly right, or both wholly wrong.

If the Workmen's Compensation Act is regarded as right in principle and the common law of A. D. 1900 as wrong in principle, then the argument is strong in favor of repudiating the common law of A. D. 1900 and going back to the common law of A. D. 1400.

If, on the other hand, the Workmen's Compensation Act is regarded as wrong in principle and the common law of A. D. 1900 as right in principle, then there is strong ground for repealing the Workmen's Compensation legislation, and adhering to the common law of A. D. 1900.

If, however, it is found impracticable to procure the repeal of the Workmen's Compensation Act, and this legislation in its extreme form is to remain on the statute book, then the question will be raised — whether the desirability of attaining uniformity and consistency of principle between statute law (in matters of wide application) and common law, renders it expedient to repudiate the modern common law (even though it be intrinsically correct) and substitute the doctrine of the ancient common law? As to this question, no opinion is here intimated.<sup>54</sup>

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<sup>54</sup> On page 249, *ante*, California should be added to the states which now have "compulsory" statutes. Laws of 1913, ch. 176; Act of May 26, 1913. See constitutional amendment, adopted Oct. 10, 1911, printed in volume of California Laws, Extra Session of 1911, page lvi.

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ABANDONED PROPERTY OF A PUBLIC SERVICE COMPANY AS DEPRECIATION. — A recent case throws much light on the power of the Interstate Commerce Commission under section 20 of the Interstate Commerce Act,<sup>1</sup> and upon the kindred subject of the proper valuation of public service companies for rate purposes. The plaintiff railway company, finding new grades essential, issued bonds, and with the proceeds constructed sections of new road in substitution for parts of the old road, this being a cheaper method than altering the old road. Regulations of the Commission allowed the company to credit its property accounts with only the difference between the full cost of the improvements and the value of the abandoned property as determined by its estimated replacement cost, and required this estimated value of the abandoned property to be charged as an operating expense. The Supreme Court<sup>2</sup> held such regulations within the power of the Commission, under section 20, and that the regulations made were not abusive of that power. *Kansas City Southern Ry. Co. v. United States*, 34 Sup. Ct. 125.

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<sup>1</sup> As amended in 1910. U. S. COMP. STAT. 1901, SUPPLEMENT 1911, p. 1304. The material parts of the section for the present purpose are: "Sec. 20. The Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept. . . . The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act."

<sup>2</sup> On appeal from the United States Commerce Court. The plaintiff sought an injunction to restrain the enforcement of the regulations as applicable to its case.



That the Commission can enforce uniform accounting follows from a previous case holding the Interstate Commerce Act constitutional.<sup>3</sup> The company urged, however, that the statute conferred upon the Commission the power to control the "form," but not the "substance" of the accounts.<sup>4</sup> But the distinction seems unsupportable, since it is clear that to secure uniformity the Commission must be able to name the headings under which the various items shall be placed.

It is true that the placing of certain items under certain heads, as in the principal case, may temporarily force a reduction in dividends and so cause hardship seemingly out of proportion to the need of uniformity in accounting. But examination will show that in most cases the method of accounting ordered is simply a means used in carrying out some rate or other regulation, the results of which must be taken into account in considering whether the Commission's order is an abuse of its power.<sup>5</sup>

In the principal case the effect of the holding is that abandoned property cannot be treated as a property asset. Now since a public service company is only entitled to earn annually a sum sufficient to pay its operating expenses and a fair return<sup>6</sup> on the present value of the property used for the public,<sup>7</sup> the regulations in question will tend to decrease the sum on which the company may earn a fair return. It is true that on the question of exactly how that value is to be determined, the law is in a stage of development,<sup>8</sup> but clearly the value, as shown by the books,

<sup>3</sup> *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 32 Sup. Ct. 436.

<sup>4</sup> The argument was that the words in the statute "to prescribe the forms of any and all accounts" distinguished between form and substance, and enabled the Commission to say in what manner the accounts should be kept, but not what items should go into certain accounts.

<sup>5</sup> For if it is an abuse of power by the Commission, undoubtedly it will not stand. *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 31 Sup. Ct. 288.

<sup>6</sup> On the general problem of what is a fair return, see 2 WYMAN, *PUBLIC SERVICE CORPORATIONS*, ch. 33.

<sup>7</sup> See *The Minnesota Rate Cases*, 230 U. S. 352, 434, 33 Sup. Ct. 729, 754. For a time other theories, notably the original cost and the cost of reproduction theories, contended with the present value theory, but the latter may now fairly be regarded as the accepted doctrine in valuation for rate purposes. The Supreme Court adopted it in *Smyth v. Ames*, 169 U. S. 466, 546, 18 Sup. Ct. 418, 434, and state courts and commissions generally abide by it. For cases proceeding on the original cost and cost of reproduction theories, respectively, see *Brymer v. Butler Water Co.*, 179 Pa. 231, 36 Atl. 249; *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, 72 N. W. 713. For a general discussion of the several theories and the various problems raised in the application of them, see 2 WYMAN, *PUBLIC SERVICE CORPORATIONS*, ch. 32.

It should always be remembered that valuation for rate purposes differs essentially from valuation for taxation, capitalization, and public purchase purposes, and that the present value theory was worked out in and especially applies to valuations for rate purposes. See, generally, WHITTEN, *VALUATION OF PUBLIC SERVICE CORPORATIONS*, ch. 1.

<sup>8</sup> The following passage from *Smyth v. Ames*, 169 U. S. 466, 547, 18 Sup. Ct. 418, 434, names many factors that are worthy of consideration in determining present value. "In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to

of the property being used for the public must play an important part in the determination, both when the company itself fixes the rates and when the Commission adjusts them. Do the property assets as limited by the regulation make a proper basis for rate valuation? Valuations for rate purposes which omit the element of depreciation are held erroneous.<sup>9</sup> Depreciation is "lessened utility value caused by physical deterioration or lack of adaptation to function."<sup>10</sup> Abandoned property is obviously no longer adaptable to function. Therefore the regulations seem both justifiable and necessary. The company's argument that the cost of abandoned property is part of the "cost of progress," and should therefore be retained in the property accounts, runs counter to the whole "present value" theory followed by the Supreme Court.<sup>11</sup> A more plausible contention was that, had the improvements been made on the old line, the whole cost of the work could under the regulations have been added to the property accounts without deduction. In such a case, however, the company has withdrawn no property from public use, since the former construction still serves as a base for the new line, and hence as a matter of accounting the value of the old line need not be subtracted from the property accounts.<sup>12</sup>

The approval of the Commission's further requirement that the depreciation be charged against operating expenses, and not against surplus,<sup>13</sup> is not so noteworthy, because the court says that neither method would have been erroneous.<sup>14</sup> The charge against operating expenses, however, seems in this case more just. Each generation should pay the cost of progress made by the road in that generation. The abandonment of an uneconomic for an economic plant is manifestly a progress. The charge against operating expenses, by necessitating a temporary increase in rates, properly places the burden on the present generation.<sup>15</sup>

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be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property." Undoubtedly there are such other matters, notably depreciation. In two rather recent cases the court has not regarded all the factors laid down in this quotation, but has gone largely on cost of reproduction and depreciation. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192. The cases illustrate the proposition that the relative weight to be given to the several factors enumerated in *Smyth v. Ames*, *supra*, depends on the facts of each case.

<sup>9</sup> *Knoxville v. Knoxville Water Co.*, *supra*; *The Minnesota Rate Cases*, *supra*.

<sup>10</sup> See WHITTEN, VALUATION OF PUBLIC SERVICE CORPORATIONS, 331.

<sup>11</sup> It would make the *actual cost* of the plant regardless of depreciation, and not its present value, the test for valuation purposes. If property is discarded, it is no longer used for the public, and therefore no return can be earned on it, even though the disallowance of such return results in a decrease or loss of dividends.

<sup>12</sup> It is believed, however, that in ascertaining present value for rate purposes, a deduction for depreciation would have to be made to cover the decreased value of the old line when used simply as a base or foundation for the new line with its changed grades. That is, it would not be correct to say that the present value of the line equals the cost of the old line plus the cost of the improvements.

<sup>13</sup> The profit and loss account.

<sup>14</sup> It should be noted here that the best practice is to have a depreciation fund, built up year by year, to cover just such items as this. See *Knoxville v. Knoxville Water Co.*, *supra*, p. 13; 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1160.

<sup>15</sup> The justice of the order is made even plainer by the fact that a regulation of the Commission provides for a projection of the depreciation, if it is large, over the operating expenses of several years.



## EXTENT OF THE LEGISLATIVE POWER TO LIMIT FREEDOM OF CONTRACT.

— A recent case decides that the constitutional guarantees of "liberty" and "property"<sup>1</sup> forbid the legislature to declare invalid any clause in a contract whereby an arbitrator's award is made conclusive of the rights of the parties thereunder. *Adinolfi v. Hazlett*, 242 Pa. 25, 88 Atl. 869. The court holds that freedom of contract may not be abridged except in the interest of "good morals" or the "welfare of the general public," and that the statute in question promotes neither of these ends. The conclusion, namely, that the legislature is powerless to deal with a question of policy which has produced wide diversity of judicial opinion,<sup>2</sup> suggests an inquiry into the soundness of the premises.

It is now settled that any statute limiting the absolute freedom to make and enforce contracts is a deprivation of "liberty" and "property,"<sup>3</sup> and without "due process of law" unless the statute can be sustained as an exercise of the "police power."<sup>4</sup> The extent of this "police power" thus becomes the vital question. As to this, two things are now tolerably clear. First, it extends to legislation calculated to promote any of the substantial interests of the community at large, other than the parties to the contract.<sup>5</sup> Secondly, whatever legislation has long been customary will be sustained without question.<sup>6</sup>

<sup>1</sup> The clause relied on is Art. I, § 1 of the Pennsylvania Constitution, declaring the right of "acquiring and possessing property" to be "indefeasible." 1 PURDON'S DIGEST, 114. But as the reasoning is that regularly-adopted under the "due process" clause in force everywhere, Pennsylvania included, the case will be discussed in the light of that provision. 1 PURDON'S DIGEST, 122; see COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., p. 500.

<sup>2</sup> The cases are collected in WALD'S POLLOCK ON CONTRACTS, 3 ed., p. 448. Even in Pennsylvania an agreement to arbitrate future disputes was invalid if the arbitrators were not named. *Commercial Union Ass. Co. v. Hocking*, 115 Pa. 407, 8 Atl. 589; cf. *Hartup v. Pittsburg*, 97 Pa. 107.

<sup>3</sup> *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427; *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277; *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007.

<sup>4</sup> *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539. The Supreme Court has recently restated this formula by declaring that "liberty" means only reasonably regulated freedom, and that in this sense it is absolutely guaranteed by the Constitution. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 567, 31 Sup. Ct. 259, 262; *Schmidinger v. Chicago*, 226 U. S. 578, 589, 33 Sup. Ct. 182, 185. This seems to be an attempt, by narrowing the meaning of "liberty" and exaggerating that of "due process of law," to support the conception of the police power adopted by the cases in note 18, *infra*.

<sup>5</sup> The validity of legislation to secure certain limited public interests is universally recognized; viz., health: *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358; safety: *New York & N. E. R. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730; morals: *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. 425. But it is sometimes suggested that the power to promote the public welfare generally is to be taken in a "restricted sense." Opinion of the Justices, 208 Mass. 619, 622. This notion seems to be repudiated by the Supreme Court. See *Chicago, B. & Q. R. Co. v. People ex rel. Grimwood*, 200 U. S. 561, 592, 26 Sup. Ct. 341, 349. And it is difficult to perceive the precise restrictions on a power which justifies infringement of private rights in order to protect game: *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499; reclaim waste land: *Chicago, B. & Q. R. Co. v. People ex rel. Grimwood*, *supra*; cf. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56; facilitate commerce: *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186; and confine business competition to methods deemed of public advantage: *Central Lumber Co. v. Dakota*, 226 U. S. 157, 33 Sup. Ct. 66. There is really no authority for the supposed "restrictions."

<sup>6</sup> "Mill acts" *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441; *Otis Co. v.*

Beyond this it is vigorously contended that the police power does not go. A considerable body of decisions, of which the principal case seems to be one, rest upon the notion that the power is confined to the detailed enforcement of the maxim *sic utere tuo ut alienum non lēdas*, and does not extend to preventing individuals from making contracts detrimental to their own interests.<sup>7</sup>

It can hardly be said that the authorities support such a proposition. The close dependence of the public welfare on that of the individual has forced the courts to sustain legislation barring persons from employments injurious to their health,<sup>8</sup> or which invalidates contracts by employees to release their employers from liability for future negligence.<sup>9</sup> On the other hand, the principles involved in laws common from the earliest times have inevitably been applied to sustain new legislation based on similar reasons. Thus, without transcending their constitutional powers, legislatures have passed from restricting the individual's freedom of contract in order to protect him against fraud<sup>10</sup> to restrictions preventing him from contracting with irresponsible persons;<sup>11</sup> from relieving debtors from some forms of oppressive contracts<sup>12</sup> to relieving them against many others;<sup>13</sup> from guarding seamen against their own improvidence<sup>14</sup> to protecting other laborers from oppression and sharp practice.<sup>15</sup> The decisions which have opposed some of these steps<sup>16</sup> represent no definite limitation on the police power consistently recognized even by the courts which rendered them.<sup>17</sup> Apart from

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Ludlow Mfg. Co., 201 U. S. 140, 26 Sup. Ct. 353; statute compelling adjoining owners to participate in mutual drainage scheme: *Wurts v. Hodgland*, 114 U. S. 606, 5 Sup. Ct. 1086. But cf. *Eubank v. Richmond*, 226 U. S. 137, 33 Sup. Ct. 76; acts relating to seamen: *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326; *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821.

<sup>7</sup> For a classic statement of this view, see *Godcharles v. Wigeman*, 113 Pa. 431, 437, 6 Atl. 354, 356. See also *Ex parte Jentzsch*, 112 Cal. 468, 473, 44 Pac. 803, 804, and *TIEDEMAN, POLICE POWER*, § 1.

<sup>8</sup> *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383; *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324; *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 303. *Contra*, *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454; and cf. *Lochner v. New York*, *supra*.

<sup>9</sup> *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259.

<sup>10</sup> As by the statute of frauds, and other legislation sustained in *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206; *Schmidinger v. Chicago*, 226 U. S. 578, 33 Sup. Ct. 182. But cf. *Harding v. People*, 160 Ill. 459, 43 N. E. 624.

<sup>11</sup> As by confining the businesses of insurance and banking to duly licensed corporations. *Commonwealth v. Vrooman*, 164 Pa. 306, 30 Atl. 217; *Weed v. Bergh*, 141 Wis. 569, 124 N. W. 664. Cf. *Queen Insurance Co. v. Leslie*, 47 Ohio 409, 24 N. E. 1072. *Contra*, *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427.

<sup>12</sup> Witness the statutes against usury and the common-law rules against penalties and against "clogging the equity of redemption."

<sup>13</sup> *Selover v. Walsh*, 226 U. S. 112, 33 Sup. Ct. 69.

<sup>14</sup> *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821.

<sup>15</sup> As in the "store order" cases. *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1. *Contra*, *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Missouri Tie Co.*, 181 Mo. 536, 80 S. W. 933. The public interest in "harmonious relations between capital and labor" was recognized in *McLean v. Arkansas*, 211 U. S. 539, 550, 29 Sup. Ct. 206, 209.

<sup>16</sup> See notes 8, 10, 11, and 15, *supra*.

<sup>17</sup> For instance, contrast *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, with *Knoxville Iron Co. v. Harbison*, *supra*; *Godcharles v. Wigeman*, *supra*, with *Commonwealth v. Vrooman*, *supra*; and *Lochner v. New York*, *supra*, with the dictum in *Soon Hing v. Crowley*, 113 U. S. 703, 710, 5 Sup. Ct. 730, 734.



authority, it seems hardly possible that the "due process" clause was designed to condemn all *future* restrictions on liberty of contract in the interest of the parties while sanctioning the whole variety of restrictions in the interest of the parties which were then familiar parts of the law.

The law, then, seems everywhere to be that the legislature may, to some extent, at least, restrict liberty to contract in the supposed interest of the persons restrained. Inasmuch as the courts which have opposed such legislation have been far from consistently defining any definite limitation to this branch of the police power, it is hard to see why the legislature's power to protect the citizen against himself is not as broad as its power to shield him from the acts of others.

The best-considered decisions overthrowing legislation as repugnant to the due process clause recognize a police power as broad as this, but hold that the constitution declares a strong public policy in favor of letting every citizen work out his own salvation, and that his power to do so should not be impaired except when necessary to correct an evident existing evil.<sup>18</sup> Such is probably the present state of the law.<sup>19</sup> The result is that the ultimate question for the court is one of fact,<sup>20</sup> which serves perhaps to explain the confusion in the authorities, as well as to excuse the principal case.<sup>21</sup>

PRICE CUTTING AS A TORT. — The resale price of ordinary articles of commerce cannot be limited at common law by contract or by restrictive covenants running in equity.<sup>1</sup> Articles manufactured by secret processes, as well as copyrighted and patented articles, have been held subject to the same rule.<sup>2</sup> A recent case raises the question whether the producer or his agent, although unable to fix the resale price, is wholly remediless when he is injured by resale price cutting. A department store owner, for the purpose of injuring a selling agent in his business, advertised a well-known make of sewing machines at half price. The court held him liable at the suit of the selling agent on the ground of a malicious injury to the plaintiff's business, under the guise of competition.<sup>3</sup> *Boggs v. Duncan-Schell Furniture Co.*, 143 N. W. 482 (Ia.).

<sup>18</sup> Opinion of the Justices, 208 Mass. 619; *Lochner v. New York*, *supra*; *Matter of Jacobs*, 98 N. Y. 98. See note 4, *supra*.

<sup>19</sup> Substantially the same conclusion has been deduced from at least two exhaustive reviews of the federal cases: SWAYZE, CONSTRUCTION OF THE FOURTEENTH AMENDMENT, 26 HARV. L. REV. 1, 40; COLLINS, THE FOURTEENTH AMENDMENT, 109.

<sup>20</sup> The expediency of leaving this question of fact to some other tribunal is discussed by Mr. John G. Palfrey in 26 HARV. L. REV. 507.

<sup>21</sup> Whether this will continue to be the rule, and what there is in the phrase "due process of law" to make the validity of an impartial statute, duly passed, turn simply on the court's ability to perceive in it some clearly beneficent purpose, are questions to be pondered. See *Central Lumber Co. v. Dakota*, 226 U. S. 157, 33 Sup. Ct. 66; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., p. 500.

<sup>1</sup> BENJAMIN, SALES, 6 ed., 746; *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219. But see 17 HARV. L. REV. 415. For limited restrictions allowed at common law, see 25 HARV. L. REV. 59, 61.

<sup>2</sup> See SHRODER, PRICE RESTRICTION ON THE RE-SALE OF CHATTELS, 25 HARV. L. REV. 59; 27 HARV. L. REV. 73. But see 26 HARV. L. REV. 640.

<sup>3</sup> The further fact that the advertisements contained misrepresentations should be noted.

For a seller to use trade names so as to pass off his goods as those of another is actionable. From these cases it has been ably argued that for a retailer, solely for purposes of self-advertising, to damage a manufacturer's good will by cutting the price of a well-known article is tortious, as involving an unwarranted use of the reputation which the producer's labor has earned for the goods.<sup>4</sup> Other retailers, as authorized selling agents, could maintain actions on the same ground. The result reached in the principal case would follow from this reasoning since the defendant is making just such an unwarranted use of the reputation of the particular sewing machines. But the view is unsupported by any body of authority. There is no misrepresentation here and the trade-name cases emphasize that element as essential.<sup>5</sup>

The problem may be treated in a way more consistent with the reasoning employed by the courts in analogous cases, by weighing the defendant's justification against the wrong done the selling agent. For employing another's reputation for one's own benefit in such a way as to interfere with that other's good will would seem at least to require justification.<sup>6</sup> Even where no acquired good will is in question, there is some authority for recognizing to the same extent an individual's right to the normal flow of the market.<sup>7</sup>

Two grounds of justification in the principal case may be urged. The law recognizes a competitor's right to promote his own business interests.<sup>8</sup> The benefit to the business must actually exist. Thus a banker was not allowed to justify the temporary opening of barber shops to drive the plaintiff out of business.<sup>9</sup> In the absence of other evidence, bad motive may be ground for inferring that no competitive interest was actually served.<sup>10</sup> Where the benefit in fact exists, and where the defendant acts from mixed motives of self-interest and of malice, the mere presence of the bad motive should not vitiate the justification. Since the party is exercising the right for the very purpose for which it is protected, the law need not concern itself with analyzing his state of mind. A second justification appears in the exercise of the *jus disponendi*.<sup>11</sup> The right to dispose necessarily implies the right to fix the price of transfer. The importance of this right is increased by the strong policy of the law against permitting any clogs on the transferability of chattels.<sup>12</sup> This justification only differs from that of competition in that no element of self-interest is required, since the *jus disponendi* includes the right to make a gift. In balancing the justification against the wrong, public policy must determine which deserves the greater protection.<sup>13</sup>

<sup>4</sup> See ROGERS, PREDATORY PRICE CUTTING AS UNFAIR TRADE, 27 HARV. L. REV. 139.

<sup>5</sup> See PAUL, TRADE-MARKS, § 8; BROWNE, TRADE-MARKS, 2 ed., § 36.

<sup>6</sup> See 16 HARV. L. REV. 135.

<sup>7</sup> See SMITH, CRUCIAL ISSUES IN LABOR LITIGATION, 20 HARV. L. REV. 253, 260; Allen v. Flood, [1898] A. C. 1, 29, 34, 36; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Atkins v. Fletcher Co., 65 N. J. Eq. 638, 664, 55 Atl. 1074, 1076.

<sup>8</sup> See SMITH, CRUCIAL ISSUES IN LABOR LITIGATION, 20 HARV. L. REV. 344, 361.

<sup>9</sup> Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946. See 22 HARV. L. REV. 616.

<sup>10</sup> See 26 HARV. L. REV. 740.

<sup>11</sup> See 26 HARV. L. REV. 740.

<sup>12</sup> See Dr. Miles Medical Co. v. Park, 220 U. S. 373, 404 ff., 31 Sup. Ct. 376, 383 ff.

<sup>13</sup> See SMITH, CRUCIAL ISSUES IN LABOR LITIGATION, 20 HARV. L. REV. 345.



Where, as in the principal case, two rights are being exercised which it is the policy of the law to protect, the justification would seem sufficient.

Although the competitor's self-interest is in fact advanced and there is an exercise of the *jus disponendi*, a further question is raised where the defendant acts solely from malicious motives.<sup>14</sup> Here again the question is one of policy, whether an entire protection of these interests is so essential to the public as to make considerations of motive relatively unimportant. Privileged communications in court and the right to collect a debt are of this class.<sup>15</sup> On the other hand some recent cases make actionable the use of property for such purposes as spite fences or maliciously draining a neighbor's spring.<sup>16</sup> The policy of such a limitation on the anti-social exercise of property rights would seem to apply with greater force to competition and price cutting from bad motive only, since the complex interdependence of modern business relations causes individual acts to have far-reaching effects. If these cases may fairly be regarded as characteristic of a tendency in the common law, an extension of the same reasoning to price cutting actuated only by bad motive may be suggested as a possible development consistent with public policy.<sup>17</sup>

RIGHTS OF PASSENGER ASSISTING IN RESTRAINT OF DISORDERLY FELLOW-PASSENGER. — It is clearly established that a carrier is held to the utmost care consistent with efficient service to protect a passenger from assaults by other passengers.<sup>1</sup> So great is this duty that if the conductor unaided is unable to control the situation, he must call in the rest of the crew and at least such passengers as are willing to help quell the disturbance.<sup>2</sup> While this can scarcely be said to be using utmost care to the well-disposed passenger summoned, the courts in the past seem never to have been called upon to determine his rights if assaulted by the disorderly fellow-passenger. However, the Supreme Court of Mississippi recently had this question squarely presented. *Spinks v. New Orleans, M. & C. R. Co.*, 63 So. 190. In this case the plaintiff, a passenger, was requested by the conductor to help restrain an intoxicated passenger who had been wandering through the coaches and resisting efforts to keep him from jumping from the train. The court, in holding that the railroad was not liable for an assault committed by the unruly passenger, went on the short ground that the conductor had not failed in his duty of care. This seems unjustifiable. The evidence taken most favorably for the plaintiff, since a directed verdict for the defendant was affirmed, showed that the conductor, knowing of the irresponsible condition of the

<sup>14</sup> For discussion of motive in the law of torts, see 8 HARV. L. REV. 1; 18 HARV. L. REV. 411; 22 HARV. L. REV. 501; 26 HARV. L. REV. 740.

<sup>15</sup> *Morris v. Tuthill*, 72 N. Y. 575; *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *Scott v. Stansfield*, L. R. 3 Ex. 220. See also *Friel v. Plumer*, 69 N. H. 498, 43 Atl. 618.

<sup>16</sup> For collection of authorities see 18 HARV. L. REV. 415, footnotes; 8 MICH. L. REV. 472, footnotes; 62 L. R. A. 673, note.

<sup>17</sup> See discussion in POUND, *THE END OF LAW*, 27 HARV. L. REV. 195, 226 ff.

<sup>1</sup> *Pittsburg & C. R. Co. v. Pillow*, 76 Pa. St. 510; *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200.

<sup>2</sup> See *Pittsburg, F. W. & C. Ry. Co. v. Hinds*, 53 Pa. St. 512, 517.

assaulter, did not first summon the rest of the crew, but ordered the plaintiff to assist and himself left the scene of trouble. It seems clear that this was not even ordinary care under the circumstances. While the conductor's conduct would be a breach of duty to a passenger, the question is presented whether the railroad may have an affirmative defense that the plaintiff in volunteering forfeited his rights as a passenger.

To be sure an outsider who volunteers at the request of one of the employer's servants becomes a servant, and is denied recovery if injured by a fellow servant's negligence.<sup>3</sup> If the volunteer, however, is not solely a Good Samaritan, but does the work partly at least for purposes other than the railroad's, he is not wholly the servant of the company, but is acting for himself and so entitled to his independent rights.<sup>4</sup> In a case like the present, the passenger in putting down a disturbance may be said in a way to be expediting his own journey. But more clearly than this his purpose was to secure peace not for the sake of the railroad, but in concert with it for the benefit of the public. As the plaintiff was not a trespasser and did not become a servant, there seems to be no reason why the plaintiff was not still a passenger.

But if it is conceded that the plaintiff retained his status as a passenger, it may be urged that by approaching a riotous fellow-passenger he assumed the risk.<sup>5</sup> But when a passenger acts upon orders of a trainman, he is allowed to assume risks that otherwise would bar recovery,<sup>6</sup> and especially in a situation like the present where one sacrifices himself for a higher duty, even a stronger reason appears for not applying the ordinary doctrine of assumption of risk.<sup>7</sup>

If it is granted then that the passenger continues in his full rights as such, recovery is assured unless the railroad has some extraordinary justification for thus summoning him into danger and was not further negligent. One may be compelled to assist a police officer,<sup>8</sup> and in certain cases at sea be compelled to assist the captain.<sup>9</sup> If the view is taken that the peculiar position of the railroad as a public service corporation confers upon its conductor like police power in emergencies, and that the passenger is under duty to obey, the higher duty to the state may well be said to supersede the railroad's duty to the passenger. The passenger could not then ask for recompense for being called to do his duty.<sup>10</sup> Even

<sup>3</sup> *Degg v. Midland Ry. Co.*, 1 H. & N. 773; *Wischam v. Rickards*, 136 Pa. St. 109, 20 Atl. 532.

<sup>4</sup> Shipper assisting in loading train: *Eason v. S. & E. T. R. Co.*, 65 Tex. 577; *Welch v. Maine Central R. Co.*, 86 Me. 552, 30 Atl. 116; *Louisville & N. R. Co. v. Ward*, 98 Tenn. 123, 38 S. W. 727. Drover shunting cattle cars: *Wright v. London & N. W. Ry. Co.*, L. R. 1 Q. B. D. 252. Passenger pushing car back on track: *McIntire Ry. Co. v. Bolton*, 43 Ohio St. 224, 1 N. E. 333.

<sup>5</sup> See *Illinois Central R. Co. v. Minor*, 69 Miss. 710, 11 So. 101.

<sup>6</sup> *Galloway v. Chicago, R. I. & P. Ry. Co.*, 87 Ia. 458, 54 N. W. 447; *Irish v. Northern Pacific Ry. Co.*, 4 Wash. 48, 29 Pac. 845. This is sometimes limited to when the passenger is reasonable in so acting. *Hunter v. Cooperstown & S. V. R. Co.*, 112 N. Y. 371. But there is some authority allowing great risk at the conductor's order. See *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291; 4 ELLIOTT, RAILROADS, § 1643.

<sup>7</sup> Cf. *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 28 N. E. 172, where the plaintiff was injured while rescuing a child from an approaching locomotive.

<sup>8</sup> *Regina v. Sherlock*, 10 Cox C. C. 170; *McMahon v. Green*, 34 Vt. 69.

<sup>9</sup> See *Boyce v. Bayliffe*, 1 Camp. 57; ABBOTT, SHIPPING, 14 ed., 901.

<sup>10</sup> A somewhat analogous situation occurs in admiralty, where if a passenger saves



on this theory the Mississippi case seems erroneous; for while the railroad would be justified in calling in the plaintiff, the conductor subsequently was negligent in leaving and not summoning the rest of the crew to aid and protect him.

A second view may be taken that a conductor, not being as a rule so far from help or subject to such great perils, is not like a sea-captain, and that a passenger by entering a train does not come under a duty to assist him.<sup>11</sup> It must then follow that the railroad, having no justification, is liable for injuries resulting from inviting a passenger into danger, regardless of its subsequent diligence. Doubtless the railroad is placed in the difficult position of liability to the other passengers if passengers are not called to aid; while if they are summoned, the railroad is liable to the volunteers if they are injured. If this result seems overburdensome upon the carrier, an escape is presented by adopting the first view that a passenger is under duty to assist the conductor.

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REQUISITES AND PROOF OF COMMON-LAW MARRIAGES. — From early times it has not always been clear what acts were necessary to the validity of a marriage.<sup>1</sup> According to early civil law the consent of the parties was sufficient,<sup>2</sup> but it seems doubtful whether under the early English common law<sup>3</sup> a marriage without a minister was valid.<sup>4</sup> In this country, however, many states have adopted the view that a marriage may be valid even without a ceremony before third parties.<sup>5</sup> The rule is usually stated to be that an agreement to be married henceforth, followed by cohabitation, constitutes the so-called common-law marriage.<sup>6</sup> But both on principle and authority it would seem that the agreement alone is sufficient to consummate a common-law marriage and that the subsequent cohabitation is important only as evidence of the agreement.<sup>7</sup>

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the ship by acts he was obliged to do in emergency, he is awarded no salvage. The *Vrede*, 1 Lush. Adm. 322. But if he acts beyond his duty he may recover. *Newman v. Walters*, 3 B. & P. 612; *The Great Eastern*, 24 Fed. Cas. No. 14,110; 2 PARSONS, SHIPPING AND ADMIRALTY, 268.

<sup>11</sup> The courts in *Pittsburg, F. W. & C. Ry. Co. v. Hinds*, cited in note 2, *supra*, and in the Mississippi case, seem to have considered that there was no duty to help the conductor.

<sup>1</sup> BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 811 *et seq.*

<sup>2</sup> BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 812.

<sup>3</sup> BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 817-818; RODGERS, DOMESTIC RELATIONS, § 85.

<sup>4</sup> By statute in England a ceremony is now required. 26 Geo. II, c. 33. But it can be before a civil officer. 6 & 7 William IV, c. 85. In Scotland an agreement to be married henceforth is sufficient. *Dalrymple v. Dalrymple*, 2 Hag. Cons. 54.

<sup>5</sup> *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 286; *Hutchinson v. Hutchinson*, 196 Ill. 432, 63 N. E. 1023; *Chamberlain v. Chamberlain*, 68 N. J. Eq. 414, 59 Atl. 813; *Tartt v. Negus*, 127 Ala. 301, 28 So. 713; *In re Hulett's Estate*, 66 Minn. 327, 69 N. W. 31. *Contra*, *Dunbarton v. Franklin*, 19 N. H. 257. Some states by statute have declared common-law marriages invalid. *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829; see *Com. v. Munson*, 127 Mass. 459-460. Other states have declared marriage a contract, and in such states a contract is usually sufficient. *State v. Bittick*, 103 Mo. 183, 15 S. W. 325. It is generally held that statutes setting forth the ceremony for marriages are only directory, and even in these states common-law marriages are good. *Renfrow v. Renfrow*, 60 Kan. 277, 56 Pac. 534.

<sup>6</sup> See *Shorten v. Judd*, 60 Kan. 73-77, 55 Pac. 286-287.

<sup>7</sup> *Thoren v. Attorney-General*, 1 A. C. 686; *Mathewson v. Phoenix Iron Foundry*,

Moreover, it is clear on the authorities, in the states where formal solemnization is not necessary, that although there is no proof of an actual written or oral contract, the agreement necessary to the formation of a common-law marriage may be inferred solely from the conduct of the parties. There are four rather common situations where this is likely to occur. In one class of cases, the only evidence of the agreement is that the parties have lived together as husband and wife. The courts have usually held this to be evidence of an agreement from which the jury may find that there was a common-law marriage.<sup>8</sup> Since such evidence does not amount to proof of a verbal agreement, we have in these cases an instance where an implied agreement is sufficient.<sup>9</sup> In the second class of cases the parties have actually contracted a marriage<sup>10</sup> and lived together, but this marriage is void<sup>11</sup> because of some disability<sup>12</sup> unknown to both parties. After the removal of the disability a new agreement of some nature is necessary.<sup>13</sup> The parties ignorant of the existence and removal of the disability simply live on as before. In this situation it would seem on ordinary contract principles that there can be worked out a new agreement to be man and wife, none the less actual because implied in fact. All the elements of a contract would seem to be present. The cohabitation, without contrary evidence, is sufficient to prove that there exists the same matrimonial intent which the parties had when they originally attempted to contract a marriage.<sup>14</sup> Although the pair believe themselves to be already bound, each gives the performance of matrimonial duties in exchange and as the price for the like performance by the other party.<sup>15</sup> The situation would thus

20 Fed. 281; see *Dumaresly v. Fishly*, 3 A. K. Marsh (Ky.) 368-370-372; see SCHOU-  
LER, DOMESTIC RELATIONS, §§ 25, 26; BISHOP, MARRIAGE, DIVORCE, AND SEPARATION,  
§§ 297-299. *Contra*, *Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609.

<sup>8</sup> *Tartt v. Negus*, 127 Ala. 301, 28 So. 713; *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106.

<sup>9</sup> *Renfrow v. Renfrow*, *supra*; *Tartt v. Negus*, *supra*; *Thoren v. Attorney-General*, *supra*.

<sup>10</sup> In such cases the first marriage can, of course, be either by ceremony or by mere agreement, where common-law marriages are good.

<sup>11</sup> *Wilson v. Allen*, 108 Ga. 275, 33 S. E. 975.

<sup>12</sup> The disability usually consists in one party having a spouse living and undivorced; but any disability, such as slavery, that makes the marriage absolutely void, would be sufficient. *Renfrow v. Renfrow*, *supra*.

<sup>13</sup> *Edelstein v. Brown*, 35 Tex. Civ. App. 625, 80 S. W. 1027.

<sup>14</sup> *Renfrow v. Renfrow*, *supra*; *Land v. Land*, 206 Ill. 288, 68 N. E. 1109.

<sup>15</sup> It is believed that the situation under discussion is analogous to the following hypothetical case. A. and B. enter into a bilateral agreement whereby A. promises to pay B. \$500, and B. in exchange promises to do something which he is already bound to do, *i. e.*, at first as in the marriage case, (but for a different reason) there is no binding contract. Later A., as he had promised, pays B. the \$500. It is submitted that this makes a binding contract, and that B. is now bound to A. to do that which he was already bound to do for another. Though not thinking he was entering into a new contract, A., when he paid over his \$500, did give it in exchange for the performance of the other party. So after the disability each spouse gives his performance in exchange for the performance of the other party.

In WALD'S POLLOCK ON CONTRACTS, 3 ed., p. 3, and in ANSON ON CONTRACTS, 13 ed., p. 47, although this situation is not under discussion, there is language to the effect that there cannot be a contract unless the parties at the time intend to enter a legal relation. It is contended that this language, if intended to apply to a situation of this kind, is incorrect. See *Yerkes v. Richards*, 170 Pa. St. 346, 32 Atl. 1089; *Bowker v. Harris*, 30 Vt. 424.



appear the same in effect as that in the first class of cases. A third situation is where the parties marry, both knowing of an existing disability, or simply live together meretriciously. In such cases since matrimonial intent cannot be inferred from past conduct, the courts, before finding a valid marriage, properly require affirmative proof of mutual consent to marriage after the disability is removed.<sup>16</sup> A fourth class of cases is where only one party knew of the disability when the pair were first married. Some courts hold that the mere continuing of cohabitation after the disability is removed is insufficient evidence of the requisite agreement.<sup>17</sup> Other courts say the fraudulent party is estopped to show his lack of consent because of his wrong, and so find a subsequent agreement.<sup>18</sup> On the analogy of ordinary contract principles, it may be argued that there is a valid agreement as soon as the disability is removed, since there is apparent mutual consent which is ordinarily sufficient.<sup>19</sup>

In the light of the above discussion an interesting case recently decided in Illinois would seem incorrect. *People v. Shaw*, 102 N. E. 1031 (Ill.). The defendant married a woman in New York, neither knowing of a disability.<sup>20</sup> They moved to Illinois, where there was no disability, and continued to live as man and wife. The defendant then deserted this woman and married another, and was held not guilty of bigamy. As the evidence showed that neither party doubted the validity of the original ceremony in New York, there was real consent by both to be married when the parties lived in Illinois thinking themselves man and wife. It is submitted, therefore, that a common-law marriage was there contracted, and that the defendant was guilty of bigamy.<sup>21</sup>

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COMPULSORY INTERCHANGE OF TRANSFERS BETWEEN INDEPENDENT STREET RAILWAY COMPANIES. — Having laid down the proposition that the legislature may enact regulations governing public service corporations,<sup>1</sup> the courts have but slowly blocked out the limitations of this power.<sup>2</sup> It is settled that the regulation must not be unreasonable.<sup>3</sup> But this term will throw little light on the subject until its meaning has been

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<sup>16</sup> There should clearly be no presumption that their meretricious intent was changed based merely on their continued cohabitation. *Harbeck v. Harbeck*, 102 N. Y. 714, 7 N. E. 408.

<sup>17</sup> *Collins v. Voorhees*, 47 N. J. Eq. 555, 22 Atl. 1054; *Hunt's Appeal*, 86 Pa. St. 294.

<sup>18</sup> *Matter of Wells*, 123 App. Div. 79.

<sup>19</sup> *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631; *cf. Tarrt v. Negus, supra*. It would seem, however, that policy is against the state imposing the marriage status without actual consent of the parties.

<sup>20</sup> The disability was caused by the fact that the woman had a husband living and her divorce from him in California was not recognized in New York. *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110. The California divorce was valid in Illinois, however. *Knowlton v. Knowlton*, 155 Ill. 158, 39 N. E. 595. This is one of the peculiar situations made possible by the decision of *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. Rep. 525.

<sup>21</sup> *State v. Thompson*, 76 N. J. L. 197, 68 Atl. 1068.

<sup>1</sup> *Munn v. Illinois*, 94 U. S. 113.

<sup>2</sup> 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1402 *et seq.*

<sup>3</sup> *Railroad Commission Cases*, 116 U. S. 307, 331, 6 Sup. Ct. 334.

more clearly defined. So far as the regulation has to do with rates, it is well settled that it is unreasonable if it is confiscatory, that is, if upon the entire business the regulation does not permit a return equal to the cost of operation and a fair profit.<sup>4</sup> Further, while it is unreasonable regulation not to leave the corporation a fair return on each general division of the service,<sup>5</sup> it has been held that the regulation is valid though it will result in the carriage of a particular class of articles or persons at a loss.<sup>6</sup>

Confiscation of the property of the company, however, cannot be the only limitation of regulation.<sup>7</sup> A recent case in the Court of Appeal for the District of Columbia held that an act of Congress requiring an interchange of transfers between two street railways independently owned and operated was constitutional. *District of Columbia v. Capital City Traction Co.*, 41 Wash. L. Rep. 766. Had this act established a through rate of five cents with a provision that each street railway should receive two and a half cents upon every through journey, it is believed that it could with propriety have been held constitutional on the ground that the legislature may establish reasonable through rates.<sup>8</sup> The public necessity is very considerable, and if the distances are not so great as to demand a zone system, two carriers are really doing the work that one ought to do,<sup>9</sup> and a single fare is all that the service is reasonably worth. Moreover, under the general system adopted by street railways of fixing a flat rate for all transportation, long or short, no objection can be founded on the ground that one type of service will not yield a profit.<sup>10</sup>

A regulation, however, which compels a carrier to perform its service free, or fails to insure the company against loss, must be unconstitutional.<sup>11</sup> It has been held, though no confiscation was shown, that a regulation was unreasonable which failed properly to safeguard the return of property to the carrier, or which failed to insure compensation for

<sup>4</sup> *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418.

<sup>5</sup> Thus the legislature cannot fix unprofitable rates on the passenger business of a railroad on the theory that the profits on the freight business will be large enough to give a fair return on the whole enterprise. *Pennsylvania R. Co. v. Philadelphia County*, 220 Pa. St. 100, 116, 68 Atl. 676; *Philadelphia & Reading R. Co. v. County of Phila.*, 228 Pa. St. 505, 77 Atl. 892. So also the state legislature must leave a carrier a fair return on its intrastate business regardless of its profits on its interstate business. This, however, may be supported on a different line of reasoning. *Smyth v. Ames*, *supra*.

<sup>6</sup> A company may be required to operate a particular train to make a connection though it can only be operated at a loss. *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1, 27 Sup. Ct. 585, discussed in 21 HARV. L. REV. 49. See also *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, U. S. Commerce Court Dec., Case No. 61. While it is undoubtedly law to-day that a carrier cannot complain that it is confiscatory to make it carry a class of commodities at a rate that is less than the fair proportional cost of the service and a fair proportion of its profits, may not a logical extension of the proposition that each division must pay its share cause such a regulation eventually to be declared unreasonable?

<sup>7</sup> *Lake Shore & Mich. So. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565.

<sup>8</sup> See 22 HARV. L. REV. 564.

<sup>9</sup> *People ex rel. Cohoes Ry. Co. v. Pub. Serv. Comm.*, 143 N. Y. App. Div. 769, 128 N. Y. Supp. 384, *aff'd* 95 N. E. 1137.

<sup>10</sup> Note 6, *supra*.

<sup>11</sup> *Railroad Commission Cases*, *supra*, 331; *Wilson v. United States Traction Co.*, 72 N. Y. App. Div. 233, 76 N. Y. Supp. 203. *Contra*, *State v. Sutton*, 84 Atl. 1057 (N. J.). See 26 HARV. L. REV. 360.



its use.<sup>12</sup> And so also it is unreasonable regulation to compel a carrier to extend credit to another carrier by a system of interchangeable mileage.<sup>13</sup> In the principal case no provisions were made for apportioning the charge collected for the through service or for adjusting the differences in the number of transfers accepted by the two companies. It cannot be assumed that precisely the same number of passengers will be carried on transfer by each company.<sup>14</sup> Therefore the company carrying the larger number will be required to carry some passengers free. Moreover, each company is subjected to the danger that the difference will be large.<sup>15</sup> It is submitted that this is unreasonable regulation.<sup>16</sup> In conclusion it must be borne in mind that to regulate is to control, not change the undertaking. The undertaking of a public service company is to exchange service for money. Such a statute as this essentially changes the undertaking, and therefore it is in no true sense a regulation. It cannot be urged, therefore, in defense of the statute, that the corporation still makes a fair profit.

## RECENT CASES.

**BURDEN OF PROOF — PROOF OF MAIN ISSUE QUANTUM OF PROOF UNDER PENAL STATUTES.** — A statute provided for the punishment of the importation of contract laborers by means of a civil action for a penalty, at the suit of the United States or an informer. *Held*, that a violation need only be established by a preponderance of evidence. *United States v. Regan*, Supreme Court, Jan. 5, 1914.

The court reverses a decision in the Circuit Court which required proof beyond reasonable doubt on the ground that the act forbidden was called a misdemeanor by the statute. The decision of the lower court was discussed and disapproved in 27 HARV. L. REV. 77.

**BURGLARY — BREAKING — OPENING A DOOR ALREADY AJAR.** — The defendant found the door of a freight car partly open, and opened it further to effect an entry for the purpose of larceny. By statute the common-law definition of burglary includes breaking into railroad-cars. Vt. Statute, 1909, § 5751. *Held*, that there was a sufficient breaking to satisfy an information for burglary. *State v. Lapoint*, 88 Atl. 523 (Vt.).

The older cases uniformly held that raising a window or pushing a door, already partly open, was not such a breaking as to make the entry a burglarious one. *Rex v. Smith*, 1 Moody C. C. 178; *Rose v. Commonwealth*, 19 Ky. L. Rep. 272, 40 S. W. 245; *Commonwealth v. Strupney*, 105 Mass. 588; *State v. Wilson*, 1 N. J. L. 502. Blackstone supports this, reasoning that the negligence of the

<sup>12</sup> *Louisville & Nashville R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 29 Sup. Ct. 246.

<sup>13</sup> *Attorney General v. Old Colony R. Co.*, 160 Mass. 62, 35 N. E. 252.

<sup>14</sup> For all that appears, an even balancing of debits and credits might have existed between the railroads in question in either the case in note 12, where the legislature attempted to compel a reciprocal lending of cars, or that in note 13, where the regulation provided for the interchangeability of mileage.

<sup>15</sup> In the principal case three companies were under the act. A case may be supposed where one company operating between the other two would get practically all transfers and no fares.

<sup>16</sup> *Chicago City R. Co. v. City of Chicago*, 142 Fed. 844. An oral decision *contra* to the principal case but citing no authorities.

house-owner is the cause. 4 BLACKSTONE'S COMMENTARIES, 226. Any such consideration is wholly inconsistent with the basic theory of the criminal law, that the state is the party plaintiff. *Reg. v. Kew*, 12 Cox C. C. 355. And where, with equal carelessness, a door or window was left unlocked, but wholly closed, one who entered was convicted of burglary. *May v. State*, 40 Fla. 426, 24 So. 498. Also where the breaking consisted of merely tearing out a twine lattice-work. *Commonwealth v. Stephenson*, 8 Pick. (Mass.) 354. Nor is there in fact any invitation held out by such negligence. But see *Timmons v. State*, 34 Oh. St. 426, 427. The probable explanation is that an artificial distinction was taken in *favorem vite*, at a time when burglary was a capital offense. Logically, widening an opening, not large enough to admit the defendant, by pushing up a window, or sliding back a door, is the forcible removal of an obstacle to entering, and a breaking of a part of the dwelling-house relied on as a security against intrusion. See *Metz v. State*, 46 Neb. 547, 553, 65 N. W. 190, 192; *State v. Boon*, 13 Ired. 244, 246. There is a growing tendency to follow the view expressed in the principal case. *Claiborne v. State*, 113 Tenn. 261, 83 S. W. 352; *State v. Sorenson*, 138 N. W. 411 (Ia.).

**CARRIERS — PASSENGERS: WHO ARE PASSENGERS — RIDING WITH FRAUDULENT TICKET BEFORE IT HAS BEEN COLLECTED.** — The plaintiff obtained a ticket on the defendant railroad at a reduced rate by falsely representing himself to be a commercial traveler. He was injured by the defendant's negligence, before the ticket was taken up by the conductor. *Held*, that he can recover. *Ashbee v. Canadian N. Ry. Co.*, 25 West. L. R. 884 (Sask.).

The relation of carrier and passenger is consensual in character, requiring that the parties should mutually assent to its creation. See *Webster v. Fitchburg R. Co.*, 161 Mass. 298, 299, 37 N. E. 165, 166. The express assent of the carrier is often evidenced by the collection of a ticket or cash fare from the party presenting himself for transportation. *Illinois C. R. Co. v. Treat*, 179 Ill. 576, 54 N. E. 290. But if such assent is obtained by fraud, the wrongdoer cannot make it the foundation of a right of action. *Fitzmaurice v. New York, N. H. & H. R. Co.*, 192 Mass. 150, 78 N. E. 418; *Way v. Chicago, R. I. & P. R. Co.*, 64 Ia. 48, 19 N. W. 828. The carrier's assent to the creation of the relationship is implied, where the applicant exactly complies with the terms of the general outstanding invitation to the traveling public. *Webster v. Fitchburg R. Co.*, *supra*; *St. Louis & S. F. S. R. Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971. This invitation is limited to those who intend to become *bonâ fide* passengers. Thus it is generally held not to include travelers trying to steal a ride, even though they may be prepared to pay fare if compelled to. *Wynn v. City & S. Ry. Co.*, 91 Ga. 344, 17 S. E. 649; and see *Chicago, R. I. & P. R. Co. v. Moran*, 117 Ill. App. 42, 45. Upon similar reasoning it would seem that the invitation was not extended to a traveler such as the plaintiff in the principal case, since he did not intend to pay the proper fare unless his fraud were discovered. It follows that the defendant owed him no duty of due care.

**CARRIERS — PERSONAL INJURIES TO PASSENGERS — ASSAULT BY ANOTHER PASSENGER — CONDUCTOR ASKING PASSENGER'S ASSISTANCE.** — The plaintiff while a passenger on the defendant's train, went at the request of the conductor to help restrain an intoxicated passenger who had been wandering through the coaches and resisting efforts to keep him from jumping from the train. The conductor left the plaintiff, who was thereafter assaulted by the intoxicated man. *Held*, that the direction of a verdict for the defendant was correct. *Spinks v. New Orleans, M. & C. R. Co.*, 63 So. 190 (Miss.).

For a discussion of the principles involved, see NOTES, p. 376.

**CONFLICT OF LAWS — SITUS FOR PURPOSE OF GRANTING ADMINISTRATION — STOCK IN CORPORATION.** — The testator died domiciled in Bermuda leaving



in New York shares of stock of the defendant, a New Jersey corporation. The defendant corporation maintained an office in New York for the transfer of shares. *Held*, that the certificates constituted property in the state for the purpose of founding administration. *Lockwood v. United States Steel Corporation*, 50 N. Y. L. J. 961 (N. Y. Ct. App., Nov. 25, 1913).

The principal case is clearly right. The state of New York had complete power over the chose in action represented by the certificates, since, there being a transfer office in the state and the corporation itself being liable to suit there, the courts of the state could furnish the remedies for a complete reduction to possession. *In re Clark*, [1904] 1 Ch. 294. The same principle applies to insurance policies. *New England Mutual Ins. Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364; *Morgan v. Mutual Benefit Ins. Co.*, 187 N. Y. 447, 82 N. E. 438. A more difficult question arises when all that exists as a basis for the attempt to found administration is the certificate itself. *Richardson v. Busch*, 108 Mo. 174, 95 S. W. 894. It is held that the certificate is taxable where it is, irrespective of the domicil of the corporation or owner. *Stern v. Queen*, [1896] 1 Q. B. 211; *Dwight v. Boston*, 12 Allen (Mass.) 316. The certificate can be attached under the same circumstances. *Simpson v. Jersey City Co.*, 165 N. Y. 193, 58 N. E. 896; *Puget Sound Nat. Bank v. Mather*, 60 Minn. 362, 62 N. W. 396. And by the American view a transfer of the certificate gives a complete irrevocable power of attorney to reduce to possession. *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775; *Grymes v. Hone*, 49 N. Y. 17. It would seem, therefore, that the courts as well as laymen consider the certificate itself a thing of value. *In rerum natura* a chose in action has no real *situs*. Its locality therefore should be governed by the possibility of control over its reduction to possession. Two different states may conceivably possess this control, and therefore it is submitted that administration might be had of the interest where the certificate is, as well as at the domicil of the corporation. The authorities, however illogically it seems, in view of the attachment and taxation cases, deny this possibility. The courts call the certificate merely evidence of the interest, and require that the interest be capable of complete reduction to possession within the state before allowing administration of it there. *Richardson v. Busch*, *supra*; *Grayson v. Robertson*, 122 Ala. 330, 25 So. 229; *Murphy v. Crouse*, 135 Cal. 14, 66 Pac. 971.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — LIBERTY TO CONTRACT — STATUTE INVALIDATING CONTRACTS FOR ARBITRATION OF FUTURE DISPUTES. — A statute declared void any provision in a contract whereby the award of any person was made conclusive of the rights of the parties thereunder. *Held*, that the statute is repugnant to a clause of the state constitution guaranteeing the right of "acquiring and possessing property." *Adinolfi v. Hazlett*, 242 Pa. 25, 88 Atl. 869.

For a discussion of the legislative power to limit freedom of contract, see NOTES, p. 372.

CONTRACTS — SUITS BY THIRD PERSONS NOT PARTIES TO THE CONTRACT — UNASCERTAINED AND INCIDENTAL BENEFICIARY. — In consideration of a conveyance of land by a person now deceased, the defendant promised to maintain him during life and to pay his funeral expenses at death. Representatives of the undertaker who buried the deceased sue on the promise. *Held*, that they cannot recover. *Lockwood v. Smith*, 143 N. Y. Supp. 480 (Sup. Ct.).

In New York a third person can recover on a contract to which he is not a party, only when he has a legal right, founded on some obligation of the promisee to him, to adopt and claim the promise as made for his benefit. *Vrooman v. Turner*, 69 N. Y. 280. The principal case denies recovery on this ground. This requirement bases the right of the third party to an action at law on his

equitable right as an attaching creditor of the promisee. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 245. It is not required that the promisee have an existing liability to the third party at the time of contracting. *Coster v. Mayor, etc. of Albany*, 43 N. Y. 399. Nor does it seem a valid objection to recovery, that the promise, as in the principal case, is an asset available only to the promisee's estate. A man's interest in securing the convenient discharge of obligations arising after death may be as real as with regard to obligations existing during life. The jurisdictions which recognize the insurance policy type of third party contracts do not require that the sole beneficiary be ascertained when the promise is made. *Whitehead v. Burgess*, 61 N. J. L. 75, 38 Atl. 802. Where the beneficiary is not a mere donee this seems even less essential. *Coster v. Mayor, etc. of Albany, supra*, 412; *Chanute National Bank v. Crowell*, 6 Kan. App. 533, 51 Pac. 575. But since allowing the third party an action at law, although a well-established doctrine is perhaps anomalous, it may be justifiable to restrict this right to cases where it clearly appears that performance was to be rendered to the third party directly, and not to the promisee. Cf. *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 308; *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218. This practical limitation would support the result in the principal case, where it was not clear that the promise was to pay the undertaker directly rather than the deceased's representatives. *Contra, Riordan v. First Presbyterian Church*, 3 Misc. (N. Y.) 553, 23 N. Y. Supp. 323, aff'd 6 Misc. (N. Y.) 84, 26 N. Y. Supp. 38; *Traver v. Snyder*, 34 Misc. (N. Y.) 406, 69 N. Y. Supp. 750.

#### COPYRIGHT — PROTECTION OF FICTION ORIGINALLY PUBLISHED AS NEWS.

— The plaintiff was the assignee of the copyright privileges on matter which he had contributed to a newspaper as news, although it was in reality the product of his imagination. The defendant produced a play into which the author had incorporated as the essence of the plot the incident which the article purported to describe. *Held*, that the plaintiff could not recover under the COPYRIGHT ACT (Act of March 3, 1891, c. 565; 26 Stat. at Large, 1106). *Davies v. Bowes*, 50 N. Y. L. J. 913 (U. S. Dist. Ct., S. D. N. Y.).

At common law the author of a literary composition is protected in his property right to the original manuscript, which includes the sole right of first publishing the same for sale. *Press Pub. Co. v. Monroe*, 73 Fed. 196; and see *Donaldson v. Becket*, 4 Burr. 2408, 2417. American and English courts differ as to whether he also enjoyed a perpetual right in the publication of his works, but both agree that the enactment of a copyright law limits the protection to the term of years specified. *Donaldson v. Becket*, 4 Burr. 2408; *Wheaton v. Peters*, 8 Pet. 591. As to news, nothing but the form in which it is cast receives protection at common law or under copyright laws. *Walter v. Steinkopf*, [1892] 3 Ch. 489; and see *Tribune Co. v. Associated Press*, 116 Fed. 126, 128. The common law, however, recognizes a property right in news, as such, where it has acquired an intrinsic commercial value by reason of prompt dissemination. *Nat. Tel. News Co. v. Western Un. Tel. Co.*, 119 Fed. 294. But, in the principal case, the article was fiction, ordinarily the peculiarly appropriate subject of copyright, and the court assumes that the only obstacle to recovery was the publication under the guise of news. The result cannot be supported upon the authority which denies the validity of a copyright on a work published under a false title, with intent to defraud the public, for in the principal case the deception was too trivial. See *Wright v. Tallis*, 1 C. B. 893, 906. But the defendant acted in reliance upon the plaintiff's representation that the article was news, and, therefore, not the subject of copyright. Obviously the plaintiff should now be estopped from causing the defendant damage by alleging the contrary. There would be no objection, however, to an injunction restraining further infringement by the



defendant, conditioned upon his being reimbursed for the reasonable outlay, innocently incurred. An analogous situation is expressly provided for in the new U. S. COPYRIGHT CODE (Act of March 4, 1909, c. 320, § 20; 35 Stat. at Large, 1080). And see the BRITISH COPYRIGHT ACT, 2 George V, c. 46, Part I, § 8.

CORPORATIONS — DISTINCTION BETWEEN CORPORATION AND ITS MEMBERS — DISREGARDING CORPORATE FICTION — COMPELLING HOLDING COMPANY TO PRODUCE SUBSIDIARY COMPANY'S BOOKS. — The plaintiff was a stockholder in a corporation owning practically all the stock of eight other corporations, a majority of whose boards of directors were officers of the holding company. The plaintiff, charging fraud in the management of the corporate business, brings suit against the holding company and its directors, and moves for the production not only of the defendant's books but for those of the corporations under its control. *Held*, that the motion be granted. *Martin v. D. B. Martin Co.*, 88 Atl. 612 (Del.).

There is a well-established right on the part of a shareholder of a corporation, after complying with certain requirements, to proceed in equity against the officers who are fraudulently mismanaging the corporate enterprise. See COOK ON CORPORATIONS, 7 ed., § 645. Another well-recognized incident of stock ownership is the right to inspect the books of the corporation in which the stockholder has invested his money. See 23 HARV. L. REV. 641. The Delaware court disregards the separate entities of the controlled corporations, and cites with approval a *dictum* allowing the corporate fiction to be disregarded to circumvent fraud or where one organization has become the "adjunct" of another. See *In re Watertown Paper Co.*, 160 Fed. 252, 256; *Hunter v. Baker Co.*, 190 Fed. 665, 668. The latter half of the rule, at least, seems somewhat arbitrary and uncertain, and has little to commend it. Too often the courts reject the doctrine of separate corporate existence when it is wholly unnecessary to do so, as in the cases where an insolvent fraudulently conveys his property to a corporation of which he is manager. *Bennett v. Minott*, 28 Ore. 339; *Bank v. Trebein*, 59 Ohio St. 316. Here the corporations being chargeable with knowledge through their officers, the cases could be disposed of under the ordinary principles of fraudulent conveyances. It is submitted that conservatism in disregarding the existence of the corporate unit is very desirable. The way is opened for difficulties and uncertainties, and a loss of the valuable features of organization in this form is more than possible. See *Gallagher v. Germania Brewing Co.*, 53 Minn. 214, 219. Further, in the principal case the same result can be reached without a disregard. The holding company as a shareholder had a right to inspect the books of the organizations whose stock it owned. The plaintiff is taking steps to enforce a right belonging to the corporation. See *Flynn v. Brooklyn, etc. R. Co.*, 158 N. Y. 493, 508. He could, by joining the subsidiary companies as well as the holding company, secure complete redress without calling the existence of the former companies into question. It is submitted that this is the more desirable way of enforcing the stockholder's rights.

COVENANTS OF TITLE — INCUMBRANCES — PUBLIC HIGHWAY AS BREACH. — The defendant conveyed to the plaintiff, with the usual covenant against incumbrances, rural land across which a public highway had been laid out prior to the time of the conveyance, but which had not been opened for use and the existence of which was not known to either party at the time. *Held*, that the public highway is not a breach of the covenant. *Sandum v. Johnson*, 142 N. W. 878 (Minn.).

An easement is such an interference with the dominion of the owner over his land as to constitute a breach of a covenant against incumbrances. *Kellogg v. Ingersoll*, 2 Mass. 97; *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545. In some jurisdictions, however, an exception is made in the case of a public highway.

It is said that where incumbrances affect only the physical condition of the property, and are obvious to the purchaser, he must have seen them and fixed his price with reference to such incumbrances. *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. 542; *Janes v. Jenkins*, 34 Md. 1. But the knowledge that a third party claims an easement may often be the sole motive inducing him to demand the protection of a covenant. *Beach v. Miller*, 51 Ill. 206, 211. Such facts, even when they fairly evidence the intention of the parties to exclude the incumbrance from the covenant, would be excluded by the parol evidence rule. See *Demars v. Koehler*, 62 N. J. L. 203, 206, 41 Atl. 720, 721; *Holmes v. Danforth*, 83 Me. 139, 142, 21 Atl. 845, 846. The strongest argument for the exception is, that by the universal course of dealing, public highways over rural land have never been regarded as incumbrances, and that this should be considered in interpreting the covenant. *Harrison v. Des Moines, etc. R. Co.*, 91 Ia. 114, 58 N. W. 1081; *Patterson v. Arthurs*, 9 Watts (Pa.) 152; *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483. In some jurisdictions especially this seems to be a settled custom. *Wilson v. Cochran*, 46 Pa. 229; *Schurger v. Moorman*, 20 Ida. 97, 117 Pac. 122. A similar result has been reached by statute in some states. PUB. STAT. VT., 1906, § 3952; REV. STAT. ILL., 1909, ch. 30, § 39. The principal case, however, cannot be supported on this line of reasoning, since the highway was neither known to the parties, nor in use at the time of the conveyance. *Howell v. Northampton R. R. Co.*, 211 Pa. 284, 60 Atl. 793. But it is said that a public highway is not depreciative, but appreciative of the value of the land, and so is not an incumbrance, but a benefit. *Harrison v. Des Moines, etc. R. Co.*, *supra*. Aside from the fact that this is not always true, an easement, whether public or private, is an interference with the owner's right to absolute dominion over the land and in that respect an injury to him. The actual damage occasioned by it should affect the determination of damages rather than the question whether or not it is an incumbrance. *Kellogg v. Ingersoll*, *supra*; *Hubbard v. Norton*, 10 Conn. 422; *Kellogg v. Malin*, 50 Mo. 496; *Demars v. Koehler*, 62 N. J. L. 203, 205, 41 Atl. 720, 721. The principal case is contrary to the weight of authority. See cases collected in RAWLE, COVENANTS FOR TITLE, sec. 80-83.

DEEDS — CONDITIONS — VALIDITY OF CONDITION SUBSEQUENT IN RESTRAINT OF TRADE. — The plaintiff, a brewer, conveyed land, title to revert if a saloon should not be maintained on it, or if beer other than the plaintiff's should be sold therein. The condition being broken, the plaintiff brings an action to enforce the forfeiture against one holding under the original grantee. *Held*, that the plaintiff cannot enforce a forfeiture. *Ruhland v. King*, 143 N. W. 681 (Wis.).

A condition subsequent in a deed of land revesting title in the grantor is valid at common law. Such a condition is void, however, if contrary to public policy. *Randall v. Marble*, 69 Me. 310. See *Smith v. Barrie*, 56 Mich. 314, 317, 22 N. W. 816, 818. A condition to the effect that the premises conveyed should be used for a certain manufacturing purpose only has been held to be valid. *Sperry v. Pond*, 5 Ohio 387. The ground of the decision in the principal case, however, was that the condition as to buying the beer from the plaintiff only was an unlawful restraint of trade. The modern tendency has been to uphold contracts, if the restraint imposed is a reasonable one, whether total or partial. *Nordenfelt v. Maxim Nordenfelt Gun & Ammunition Co.*, [1894] A. C. (Eng.) 535; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 28 Atl. 973. Thus a contract to purchase goods of one firm only is not an unreasonable restraint of trade, although unlimited in time. *Brown v. Rounsavell*, 78 Ill. 589; *John Bros. Abergarn Brewery Co. v. Holmes*, [1900] 1 Ch. (Eng.) 188. On principle the restraint imposed in the principal case would seem to be reasonable, for it does not



appear that the condition was part of a scheme to monopolize, and no greater restrictions are laid down than necessary for the plaintiff's interest. Doubtless the decision can be explained because of the modern horror of forfeiture with the consequent willingness of the courts to stretch a point, if necessary, to avoid it. *Cf. Clement v. Burtis*, 121 N. Y. 708, 24 N. E. 1013.

ESTATES IN FEE SIMPLE — DETERMINABLE FEES IN AMERICA — PROPERTY TAKEN BY EMINENT DOMAIN. — Land belonging to the plaintiff was taken by a railroad by eminent domain proceedings under a statute which provided that the railroad should be "seised in fee . . . and hold and use for the purposes specified." The railroad when it no longer needed the land for its purpose sold it to the defendant. *Held*, that the railroad having only a determinable fee, on the abandonment the plaintiff was entitled. *Lithgow v. Pearson*, 135 Pac. 759 (Colo.).

Property can be taken by eminent domain proceedings for public purpose only. *In re Tuthill*, 163 N. Y. 133, 57 N. E. 303; *Edgewood Railway Company's Appeal*, 79 Pa. 257. Consequently merely such an interest in the property should be taken as is necessary to carry out the public purpose. *Conklin v. Old Colony R. Co.*, 154 Mass. 155, 28 N. E. 143; *Kansas Central Ry. Co. v. Allen*, 22 Kan. 285. It has been held that the legislature should be the judge of what this interest is. *Fairchild v. City of St. Paul*, 46 Minn. 540, 49 N. W. 325. The majority of courts, however, construe eminent domain statutes as authorizing the condemnation only of an easement. *Proprietors of Locks and Canals v. Nashua and Lowell R. R. Co.*, 104 Mass. 1; *Kellogg v. Malin*, 50 Mo. 496. Where the taker is the state or municipality, the fee simple is often held to pass. *Haldeman v. Penn. Central R. R.*, 50 Pa. 425; *Malone v. Toledo*, 34 Oh. St. 541. The principal case using the machinery of a determinable fee to accomplish the desired limitation of the interest seems to have but little following. *Matthieson & Hegeler Zinc Co. v. La Salle*, 117 Ill. 411, 8 N. E. 81. The effect of the Statute of *Quia Emptores* was to destroy the tenure formerly existing between the grantor of a fee simple and his grantee and therefore theoretically determinable fees can no longer be created where *Quia Emptores* is in force, as is the case in nearly all American jurisdictions. See GRAY, RULE AGAINST PERPETUITIES, §§ 31-41 a, 774-788; 17 HARV. L. REV. 297-316. But if a statute can be construed to authorize the creation of such an interest in certain cases it may be argued that it has to that extent repealed *Quia Emptores*. If this is sound it would seem that eminent domain statutes of the type in the principal case have created an exception to the general rule in favor of landowners whose property is taken by condemnation proceedings. It must furthermore be admitted that apart from any statutory provisions there is a tendency in the United States to ignore the theoretical difficulties and allow determinable fees in all cases. *First Universalist Society v. Boland*, 155 Mass. 171, 29 N. E. 524.

INTERSTATE COMMERCE — CONTROL BY STATES — RAILROAD REGULATION — REGULATIONS BY STATE COMMISSION AS TO DEMURRAGE. — The Michigan Railroad Commission passed certain demurrage rules applicable to all traffic beginning or ending within the state. These rules allowed shippers from one to three days longer for loading and unloading goods than the rules of the Interstate Commerce Commission. The plaintiff filed a bill to restrain the state commission from enforcing its rules. *Held*, that the commission will be enjoined. *Michigan Central R. Co. v. Michigan R. Commission*, 20 Det. Leg. News 946 (Sup. Ct., Mich., Oct. 11, 1913).

The court is right in holding that the rules are unconstitutional so far as they apply to interstate traffic, as being a regulation of interstate commerce as such. *Wabash, St. Louis & Pacific R. Co. v. Illinois*, 118 U. S. 557. See

*Minnesota Rate Cases*, 230 U. S. 352, 415-416, 33 Sup. Ct. 729, 747. The court further says that the rules would be unconstitutional even if applied only to intrastate traffic. But it has been decided that a state can regulate the rates of interstate carriers as to intrastate traffic. *Minnesota Rate Cases*, *supra*. And it is submitted that the slight holding up of interstate cars that might result from the longer time allowed by the state demurrage rules would be a less material interference with interstate commerce than the regulation of intrastate rates. The court in the principal case curiously relies on one of the federal court decisions (*Shepard v. Northern Pacific R. Co.*, 184 Fed. 765), which was reversed by the Supreme Court in the *Minnesota Rate Cases*. Assuming that the rules in question would be constitutional if applied solely to intrastate traffic, the question presents itself, whether the rules can be separated and upheld as to the constitutional part. This problem of splitting a statute seems to depend on whether it can reasonably be assumed that the legislature would have preferred the statute to be partially effective rather than entirely null. See *The Employers' Liability Cases*, 207 U. S. 463, 501. Whether we attribute to the Commission in the principal case a desire to bear down on the railroads or to benefit the people of the state, it can reasonably be presumed that a partially effective statute would have been preferred to one void *in toto*. If this is so, it would seem that the statement of the court as to intrastate traffic is not a mere *dictum* but a holding *contra* to the *Minnesota Rate Cases*. (For a discussion of those cases, see article, 27 HARV. L. REV. 1.) If the Wisconsin court's holding that the entire statute is unconstitutional is erroneous, nevertheless it is not open to review by the United States Supreme Court for the reason that there is no denial of any federal right claimed by the defeated litigant.

**LIBEL AND SLANDER — PLEADING AND PROOF — APPLICATION TO PLAINTIFF.** — The defendant, a physician, told of an experience in his practice with a young woman. He named no one and did not mean the plaintiff. The plaintiff, however, proved that people thought the story was about her. *Held*, that the defendant is entitled to a peremptory instruction. *Newton v. Grubbs*, 159 S. W. 994 (Ky.).

In the principal case no name was mentioned. It is, however, a sufficient description of the plaintiff if the hearers reasonably suppose that the plaintiff is referred to. *Hird v. Wood*, 38 Sol. J. 234; *Le Fanu v. Malcolmson*, 1 H. L. C. 636. But the court regards intention on the part of the defendant as necessary, interpreting too literally the requirement that the words be "published of and concerning the plaintiff." *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462. But this requirement, on logic and authority, only means that the jury must find that reasonable hearers under the circumstances would so understand the words. Intent to refer to the particular plaintiff is not necessary. *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392; *Farley v. Evening Chronicle Pub. Co.*, 113 Mo. App. 216, 87 S. W. 565. Any doctrine of non-liability for negligent use of language refers to the action of deceit, not to defamation. Defamation is an action at peril. *Peck v. Tribune Co.*, 214 U. S. 185, 29 Sup. Ct. 554. The law seems to have reached the stage where those who utter defamatory statements that may reasonably be applied to some innocent person must stand the consequences if that person is injured thereby.

**LIBEL AND SLANDER — REPETITION — LIABILITY FOR PRIVILEGED REPETITION.** — The defendant told the father of the plaintiff's fiancée that the plaintiff was already married. The father repeated this to his daughter, whereby the marriage was delayed until the charge was disproved. *Held*, that the defendant is liable for the repetition. *Bordeaux v. Joles*, 25 West. L. R. 894 (Sup. Ct. of Alberta).

The general rule is that there is no liability for the repetition by others of



defamation. *Ward v. Weeks*, 7 Bing. 211; *Hastings v. Stetson*, 126 Mass. 329. As a matter of law, the damages due to repetition are held to be too remote, though it is common experience that the repetition of slander is in fact a most natural and probable consequence of the publication of it. *Hastings v. Stetson*, *supra*. This proceeds upon the unsound and, in this country, discredited doctrine, that in questions of legal cause responsibility for an act does not extend beyond the last wrongdoer. See *Elmer v. Fessenden*, 151 Mass. 359, 362; see also 25 HARV. L. REV. 111-113, 119-122. But an exception to this non-liability exists where the repetition is privileged, the person hearing the charge being under a legal or moral obligation to repeat it. *Derry v. Handley*, 16 L. T. N. S. 263. The reason generally assigned is that the person repeating the charge is here not a wrongdoer, and that the originator is the last wrongdoer. See *Elmer v. Fessenden*, *supra*. A more practical reason is that unless the plaintiff were given recovery against the originator of the slander, he would be remediless. See *Bassell v. Elmore*, 48 N. Y. 561, 564. Even on the reasoning of the general rule this exception is justified, for the repetition is obviously a more natural consequence when the party repeating the charge is under a duty to do so, than in the ordinary case of repetition. Moreover, the exception is particularly desirable, since it limits an archaic rule of causation.

MARRIAGE — VALIDITY — COMMON-LAW MARRIAGE. — The defendant married X. in New York. At the time of this marriage X. had a husband from whom she had been divorced in California, but which divorce was invalid in New York. The parties then moved to Illinois where the California divorce decree was valid, and there cohabited together. The defendant subsequently deserted X. and contracted another marriage. The defense to an indictment for bigamy was that the defendant and X. were not man and wife in Illinois. *Held*, that the defendant is not guilty of bigamy. *People v. Shaw*, 102 N. E. 1031 (Ill.).

For a discussion of the requisites of common-law marriage, see NOTES, p. 378.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — INJURY OCCURRING "IN THE COURSE OF" AND ARISING "OUT OF" EMPLOYMENT. — The plaintiff, employed as a night watchman in the defendant's train yard, received permission to go for his clothes to a portion of the premises outside the part where his duties were performed. While returning to the part of the premises where he carried on his work he was injured by one of the defendant's engines. *Held*, that the plaintiff is entitled to compensation. *Gonyea v. C. N. Ry. Co., Canadian*, 26 West. L. R. 57 (Sup. Ct. Saskatchewan).

The Canadian statute follows the English act and requires both that the injury occur "in the course of" and that it arise "out of" the employment. STAT. 6 ED. VII, c. 58, § 1, subsec. (1). The same phrasing is found in seventeen of the twenty-two acts now adopted in the United States. An accident arises "out of" the employment when it results from a risk incidental to the employment, as distinguished from a risk common to all mankind. *Pierce v. Provident, etc. Co.*, [1911] 1 K. B. 997; *In re Employers' Liability, etc. Corp.*, 102 N. E. 697 (Mass.). The accident in question seems to fall within this definition. Whether it is within the course of the employment has been said to depend upon the geographical test of whether the workman is upon the premises where the work is being carried on, and whether his presence there is incidental to his work. See 25 HARV. L. REV. 401, 406. The court points out that in this case the plaintiff was clearly beyond the ambit of his employment. A broader definition and the one adopted by the court is whether the plaintiff was injured while doing what a man so employed might reasonably do within the time he is employed. *Moore v. Manchester Liners*, [1910] A. C. 498, 500; *Bryant v. Fissell*, 86 Atl. 458 (N. J.). Either test has the desirable feature of being

purely external and easy to apply, thereby decreasing opportunity for litigation, one of the objects of compensation statutes. See 25 HARV. L. REV. 328, 332. Nevertheless, whether an injury arose "in the course of" the employment has been a frequent subject of dispute. As with the fellow-servant rule, the exact time of beginning and ending labor is not the determining factor. *Riley v. Holland & Sons*, [1911] 1 K. B. 1029; *Sharp v. Johnson & Co.*, [1905] 2 K. B. 139. An engineer crossing tracks on a private errand was denied recovery because the employment was thereby broken. *Reed v. Great W. Ry. Co.*, [1909] A. C. 31. *Contra*, *Goodlet v. Caledonian Ry.*, 4 Fraser 986. Compensation was refused a station ticket collector who fell from a train upon which he had stepped for his own purposes. *Smith v. Lancashire, etc. Ry.*, [1899] 1 Q. B. 141. But a workman leaving to get a drink recovered; *Keenan v. Flemington Coal Co.*, 5 Fraser 164; as did a driver of a wagon hurt while picking up his pipe. *M'Lauchlan v. Anderson*, 48 Scot. L. R. 349. See also *Blovelt v. Sawyer*, [1904] 1 K. B. 271. A liberal construction of the test laid down seems in accordance with the spirit of the legislation, which is not the extension of liability for wrong doing, but to alleviate an undesirable social condition. Allowing compensation in the principal case is in harmony with that purpose.

**MORTGAGES — EQUITY OF REDEMPTION — CLOGGING EQUITY OF REDEMPTION: VALIDITY OF AN OPTION COLLATERAL TO A FLOATING CHARGE.** — The appellant loaned money to the respondent, repayable on demand; but, if the interest were duly paid, no demand to be made before September 30, 1915. The debtor had the option to repay at any time after one month's notice. As security, a floating charge upon the debtor's undertaking (business) and property was created. By collateral agreement in the mortgage the debtor gave the lender an option to buy all of a certain by-product acquired up to August 20, 1915. Prior to November, 1913, the debtor paid up the loan. The lender sought to enjoin a breach of the collateral agreement. *Held*, that the respondent should have been enjoined. *Kreglinger v. New Patagonia, etc. Co.*, 136 L. T. J. 110 (H. of L.).

The English law prior to the principal case enforced collateral agreements, not unconscionable, to continue during the existence of the security, but not after redemption. They were not invalid simply because "additional to the principal, costs, and interest secured." *Biggs v. Hoddinott*, [1898] 2 Ch. 307; *Bunbury v. Walker*, 1 Jac. & W. 225. *Contra*, JONES, MORTGAGES, 6 ed., § 1044. On the other hand, agreements, calculated to extend beyond redemption, were unenforceable after redemption. *Noakes & Co., Ltd., v. Rice*, [1902] A. C. 24; *Bradley v. Carrett*, [1903] A. C. 253 (overruling *Stanley v. Wilde*, [1899] 2 Ch. 474). An absolute day of cleavage was thus created. After the repayment of his loan the mortgagor should be "free from interference in his enjoyment again of full ownership." See 21 HARV. L. REV. 472-473. In the principal case the court admits that the rule against clogging equities applies to floating charges, but in some way, not indicated, distinguishes the cases cited above. Any distinction based upon the independent character of the agreement seems tenuous. Moreover, it allows creditors to overreach debtors by means of collateral agreements, substantially within the rule of *Bradley v. Carrett*, *supra*, but brought within the rule of the principal case by extending the law day of the mortgage beyond the date for terminating the collateral agreement, but with an option in the mortgagor to repay sooner. See 136 L. T. J. (Eng.) 137, 138. Such a result seems indefensible. For a discussion of the rule against clogging the equity, see 13 HARV. L. REV. 595; 15 HARV. L. REV. 661; 21 HARV. L. REV. 468-473.

**NUISANCE — WHAT CONSTITUTES A NUISANCE — INJURY TO PRIVATE PROPERTY BY RAILROAD.** — The defendant's railroad, though operated without



negligence, caused incidental annoyance and damage to the adjacent property of the plaintiff. *Held*, that such operation constitutes neither a nuisance, nor an appropriation of property without just compensation. *Roman Catholic Church of St. Anthony of Padua v. Pennsylvania R. Co.*, 207 Fed. 897 (C. C. A.).

The cases have held that incidental annoyance to property owners, such as noise, jarring, smoke, and cinders, must, within certain limits, be suffered in the interests of the general public. *Carroll v. Wisconsin Central Co.*, 40 Minn. 168; *Beseman v. Pennsylvania R. Co.*, 50 N. J. L. 235, 13 Atl. 164. But this justification obviously fails where the act complained of is without legislative sanction. *Jones v. Festiniog Ry. Co.*, L. R. 3 Q. B. 733; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432. This defense is likewise unavailing where the road has been run negligently, for the interests of the public at large do not demand that a community be subjected to unnecessary inconvenience. *Bunting v. Pennsylvania R. Co.*, 189 Fed. 551. The annoyance in the principal case not being within these exceptions, there arises the further question whether requiring the property owners to undergo damage to their land is taking without just compensation contrary to the federal Constitution. The construction of an elevated railroad so as to interfere with a property owner's enjoyment of light and air from a public street has been held to be such a taking. *Story v. New York Elevated R. Co.*, 90 N. Y. 122; *Aldis v. Union Elevated R. Co.*, 203 Ill. 567, 68 N. E. 95; see 17 HARV. L. REV. 201. No such question, however, is involved in the principal case, since the railroad was running on its own property, and there is no easement of light and air as to private land in this country. *Rogers v. Sawin*, 10 Gray (Mass.) 376; *Parker v. Foote*, 19 Wend. (N. Y.) 309. Nor can causing consequential damage, as here, be considered a taking. *Smith v. Corporation of Washington*, 20 How. (U. S.) 135. See *Heiss v. Milwaukee & Lake Winnebago R. Co.*, 69 Wis. 555, 558, 34 N. W. 916, 917; *Garrett v. Lake Roland Elevated R. Co.*, 79 Md. 277, 280, 29 Atl. 830, 831. But see 19 HARV. L. REV. 127. Again, such annoyance as that in the principal case is not inconsistent with any right of the plaintiff, who must be regarded as owning subject to such users and burdens of the public as the courts may determine are reasonably necessary.

OFFER AND ACCEPTANCE — REWARD — UNILATERAL CONTRACTS. — A reward was offered by the defendant for the arrest of a criminal. A police officer made the arrest, but the prisoner broke away from him and in the pursuit surrendered to the plaintiff. The defendant voluntarily paid the reward to the officer. The plaintiff now sues, claiming that although not acting in concert with the officer he is entitled to share in the reward as having aided in the arrest. *Held*, that the plaintiff is not entitled to any part of the reward. *Stair v. Heska Amone Congregation*, 159 S. W. 840 (Tenn.).

This case is noteworthy as a well-reasoned decision on a point on which satisfactory authority is conspicuously missing. The court gives an admirable statement of the law where the question is whether a reward should be divided between several persons: " . . . his right to so share in the reward depends upon there having been concert of action between him and Policeman Johnson when the endeavor was entered upon. Where there is no such concert as to joint efforts, he alone is entitled to the reward who first substantially complies with the terms of the offer." See a discussion of the same question in 27 HARV. L. REV. 185.

PLEDGES — EFFECT OF AGREEMENT TO PLEDGE FUTURE PROPERTY. — A farm lease contained the provision that all crops grown on the land should remain in the possession of the lessor until the rent payments had been satisfied. The lessee entered and raised a crop of small grain, which he sold and delivered to the defendant with notice of the stipulation in the lease. The rent not having

been paid the lessor sues to recover possession of the grain. *Held*, that he may recover. *McGarvey v. Prince*, 143 N. W. 380 (S. D.).

By statute in South Dakota, "Every transfer of an interest in property, . . . made only as security for the performance of another act, shall be deemed a mortgage, except when, in the case of personal property, it is accompanied by actual change of possession, in which case it is to be deemed a pledge." CIVIL CODE, S. D., § 2044. Possession by the pledgee is essential to a valid pledge at common law. *Thompson v. Dolliver*, 132 Mass. 103. Where the chattels remain in the control of the pledgor there is no sufficient delivery of possession. *Casey v. Cavaroc*, 96 U. S. 467; *Lilienthal v. Ballou*, 125 Cal. 183, 57 Pac. 897; *Lee, Wilson & Co. v. Crittenden County Bank & Trust Co.*, 98 Ark. 379, 135 S. W. 885. The court seems in error, then, in treating this as a pledge with constructive possession. But where there is an agreement to give specific property as security, without the technical legal requisites, equity will establish a lien by enforcing the agreement between the parties and volunteers or purchasers with notice. *First National Bank of Omaha v. Day*, 150 Ia. 696, 130 N. W. 800; *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453. The principle should apply as well to property not yet in existence or to be acquired in the future, if sufficiently specified. *Holroyd v. Marshall*, 10 H. L. C. 191; *McCaffrey v. Woodin*, 65 N. Y. 459. But there is considerable opposition to such a doctrine in the United States, as tending too greatly to prejudice creditors. *Hitchcock v. Hassett*, 71 Cal. 331, 12 Pac. 228; *Robertson v. Robertson*, 186 Mass. 308, 71 N. E. 571. Certainly an unrecorded agreement to give security unaccompanied by any actual delivery of the property will not be enforced to the prejudice of those whom the recording statutes are intended to protect. *St. Joseph Hydraulic Co. v. Wilson*, 133 Ind. 465, 33 N. E. 113; *Lake Superior Ship Canal, etc. Co. v. McCann*, 86 Mich. 106, 48 N. W. 692. It has been said under the South Dakota statute that no lien except that of a chattel mortgage is tolerated, unless accompanied by possession in the lienee. See *Greeley v. Winsor*, 1 S. D. 117, 120, 45 N. W. 325, 326. As the statute seems at least partly for the protection of the lienor, this view would seem to be sound. See CIVIL CODE, S. D., §§ 2091, 2092. Under such a view of the statute it is difficult to see how any lien can be created in the principal case. See 21 HARV. L. REV. 61; 19 HARV. L. REV. 557.

PLEDGES — TORTIOUS DISPOSAL BY PLEDGEE — EFFECT UPON RIGHT TO RECOVER THE DEBT. — A stockbroker carrying stock on a margin mingled it with other securities and pledged it for an indebtedness of his own of a larger amount than that due from the customer. The customer later refused to take the stock and was sued by the broker. *Held*, that the pledge was a conversion and constituted a complete defense to the original indebtedness. *Sproul v. Sloan*, 241 Pa. 284, 88 Atl. 501.

If stock is purchased by a broker on a margin for his customer the relation of pledgee and pledgor arises. *Richardson v. Shaw*, 209 U. S. 365, 28 Sup. Ct. 512; *Markham v. Jaudon*, 41 N. Y. 235. A repledge for a sum larger than the debt is a conversion. *Douglas v. Carpenter*, 17 App. Div. 329, 45 N. Y. Supp. 219; *Strickland v. Magoun*, 119 App. Div. 113, 104 N. Y. Supp. 425; *id.*, 190 N. Y. 545, 83 N. E. 1132. See 9 HARV. L. REV. 540; 19 HARV. L. REV. 529. The weight of authority in the United States is that even without a tender trover will lie, the damages being the full value. *Douglas v. Carpenter*, *supra*; see *Neiler v. Kelly*, 69 Pa. 403, 409. See 9 HARV. L. REV. 540; 18 HARV. L. REV. 610. If trover is not allowed, there would be an action on the case for which damages will be those actually suffered. The conversion is a breach of contract, but in the simple case of pledge it seems not a sufficient cause for rescission. *Ratcliff v. Evans*, Yelv. 179; *Jarvis v. Rogers*, 15 Mass. 389, 408. See *Johnson v. Stear*, 15 C. B. N. S. 330, 33 L. J. C. P. 130; *Donald v. Suckling*,



L. R. 1 Q. B. 585; *Halliday v. Holgate*, L. R. 3 Ex. 299. In the principal case there is also the relation of principal and agent. If a broker makes executory contracts of purchase for future delivery in his own name, and before the day of payment, without instructions, closes out the contracts at a loss, he cannot hold his principal, since no money has even been due from the agent to the third party, and thus the contract of indemnity has never become complete. *Ellis v. Pond*, L. R. [1898] 1 Q. B. 426; *Higgins v. McCrea*, 116 U. S. 671. But if the exchange has taken place between the agent and the third party a debt from the principal to the agent is created, the right of indemnity being complete. The subsequent conversion, it is submitted, should not wipe this out. *Lacey v. Hill*, L. R. 8 Ch. App. 921; *Ellis v. Pond*, *supra*, 438; *Minor v. Beveridge*, 141 N. Y. 399, 36 N. E. 404. Where the damages for the conversion equal or exceed the sum due the broker this distinction may be academic, but if the damages are less, for example, if at the time of the conversion the value of the stock has depreciated, it becomes real.

PROXIMATE CAUSE — INTENDED CONSEQUENCES — SUICIDE INDUCED BY THREATENING LETTERS. — The plaintiff sued to recover damages for the death of her husband. The declaration alleged that the defendants sent to the decedent, whom they knew to be nervous and excitable, a letter threatening mysterious disclosures unless he resigned his official position at once; that this letter so unbalanced the decedent's mind that he killed himself; and that this result was contemplated and intended by the defendants. *Held*, that the declaration does not state facts sufficient to constitute a cause of action. *Stevens v. Steadman*, 79 S. E. 564 (Ga.).

The modern law of torts recognizes the general proposition that the intentional infliction of harm without justification is an actionable wrong. See *Skinner & Co. v. Shew & Co.*, [1893] 1 Ch. 413, 422; *Aikens v. Wisconsin*, 195 U. S. 194, 204. Logically, therefore, although threats alone constitute no cause of action, one who has intentionally injured another by means of threatening letters should answer in damages. *Grimes v. Gates*, 47 Vt. 594. Thus at least one court has intimated that to tell a man something intended to drive him mad would be actionable if it had the desired result. See *Silsbee v. Webber*, 171 Mass. 378, 380, 50 N. E. 555, 556. Similarly, to threaten a man with mysterious charges in the hope of driving him to suicide would seem to be a legal wrong if the intended result should follow. The considerations of policy which lead some courts to refuse recovery for damage caused by mental shock alone admittedly do not apply to intentional harm. See *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 290, 47 N. E. 88, 89. Nor should there be any difficulty with respect to causation when the defendant intended his victim's self-destruction. For the authorities agree that an intended result, however improbable, is always proximate. *Regina v. Michael*, 2 Moody C. C. 120; *Regina v. Martin*, 8 Q. B. D. 54. See POLLOCK, TORTS, 9 ed., p. 32. It is equally well settled that the intervening act of the injured party does not make the defendant's act remote. *Jones v. Boyce*, 1 Stark. 493; *People v. Lewis*, 124 Cal. 551, 57 Pac. 470. The principal case, therefore, inasmuch as it was concerned solely with the sufficiency of allegation, seems erroneous in holding that the defendants' letter could not have been the legal cause of the suicide. *Malone v. Cayzer, Irvine & Co.*, 45 Scot. L. Rep. 351. Its theory appears to be that causation cannot be traced through mental states. But the law is now well settled to the contrary. *Ex parte Heigho*, 18 Ida. 566, 110 Pac. 1029; *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034. The facts of the principal case suggest the further question whether the decedent's own wrong was so far the cause of his death as to defeat recovery at the suit of his wife. It may be that voluntary wilful suicide would bar the action. *Daniels v. New York, N. H. & H. R. Co.*, 183 Mass. 393, 67 N. E. 424; but see 17 HARV. L.

REV. 125. But where the defendant's act so unbalances the decedent's mind that it loses the quality of free voluntary action, he is not fairly chargeable with his own death. *Cf. Sumwalt Ice, etc. Co. v. Knickerbocker Ice Co.*, 114 Md. 403, 80 Atl. 48. Suicide under such circumstances should not defeat the action.

**PUBLIC SERVICE COMPANIES — REGULATION — STREET RAILWAYS — RIGHT TO REQUIRE INTERCHANGE OF TRANSFERS.** — Congress passed a law requiring the interchange of transfers between two street railways in the District of Columbia that were independently owned and operated. *Held*, that the law is constitutional. *District of Columbia v. Capital City Traction Co.*, 41 Wash. L. Rep. 766.

For a discussion of the right of the legislature to compel an interchange of transfers see this issue of the REVIEW, at p. 380.

**PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — DISCRIMINATION IN RATES: CONTINUING CONTRACT NOT DISCRIMINATORY WHEN MADE WHICH BECOMES SO BY A SUBSEQUENT CHANGE IN OTHER RATES.** — The defendant company contracted to furnish the plaintiff telephone service at a certain yearly rate during the continuance of an opposition company. Other patrons were served at the same rate, but their contracts, unlike that of the plaintiff, were subject to discontinuance at sixty days' notice. The defendant later raised the rate for all service of this class, cancelling on notice all existing contracts. *Held*, that the plaintiff may recover. *Dean v. Central District Printing & Telegraph Co.*, 61 Pitts. L. J. 613 (Pa. C. P. Lawrence Co., Aug., 1913).

It is the settled policy of public service law that all persons shall pay the same rates for the same service. *Postal Cable Telegraph Co. v. Cumberland Tel. & Tel. Co.*, 177 Fed. 726; *Bell Tel. & Tel. Co. v. Beach*, 8 Ga. App. 720, 70 S. E. 137. Therefore a contract providing for charges which are an apparent and present discrimination over rates charged others is void. *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 21 Sup. Ct. 561; *Armour Packing Co. v. Edison Co.*, 115 App. Div. 51, 100 N. Y. Supp. 605. In furtherance of this policy it has been held under the Interstate Commerce Act that a continuing contract for service at a fixed price is subject to variation by changes in the published rates. *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428; *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265. Since the best opinion seems to be that the Interstate Commerce Act as to its provisions on discrimination is merely declaratory, the above cases seem directly in point against the principal case. Logically it would seem that the power of a public service company to bind itself to continue service at a fixed price is necessarily qualified by the controlling principle of equality. Judged by this test the principal case is incorrect. *Contra, Buffalo Merchants' Co. v. Frontier Tel. Co.*, 112 N. Y. Supp. 862.

**PUBLIC SERVICE COMPANIES — VALUATION FOR RATE PURPOSES — ABANDONED PROPERTY AS DEPRECIATION.** — The plaintiff railroad company built sections of new road in substitution for parts of the old road, this being a cheaper method than changing the old road. Regulations of the Interstate Commerce Commission allowed the company to credit its property accounts with only the difference between the full cost of the improvements and the value of the abandoned property as determined by its estimated replacement cost, and required the estimated replacement cost to be charged against operating expenses. The company sued to enjoin the enforcement of the regulations. *Held*, that the regulations are proper. *Kansas City Southern Ry. Co. v. United States*, 34 Sup. Ct. 125.

For discussion of this case, see NOTES, p. 369.



RAILROADS — LIABILITY FOR DAMAGE TO ANIMALS — CATTLE RUNNING AT LARGE. — The plaintiff's horse was killed by one of the defendant's trains in a district where cattle might lawfully run at large. The jury found that the train was operated negligently, and that cattle were reasonably to be expected upon the unenclosed right of way. *Held*, that the plaintiff may recover. *Houston, etc. R. Co. v. Garrett*, 160 S. W. 111 (Tex.).

Many states in the South and West have held inapplicable to their conditions the common-law rule which required the owner of cattle to keep them at his peril from trespassing upon the land of another. *Wagner v. Bissell*, 3 Ia. 396; *Pace v. Potter*, 85 Tex. 557, 22 S. W. 300. See INGHAM, LAW OF ANIMALS, 265 *et seq.* In these jurisdictions, in the absence of local regulations, the owner of cattle is not liable for their trespasses on unenclosed lands. *Morris v. Fraker*, 5 Colo. 425. But it is well settled that cattle have no affirmative right to graze upon such lands. *Harrison v. Adamson*, 76 Ia. 337, 41 N. W. 34. It is also generally agreed, contrary to the assumption of the principal case, that although their owner is relieved from liability, the cattle are still trespassers for purposes of determining the landowner's obligations. *Beinhorn v. Griswold*, 27 Mont. 79, 69 Pac. 557; *Corbett v. Great Northern Ry. Co.*, 19 N. D. 450, 125 N. W. 1054. *Cf. Hurd v. Lacy*, 93 Ala. 427, 428, 9 So. 378. The landowner, therefore, is not bound to keep his premises in safe condition for cattle running at large. *Herold v. Meyers*, 20 Ia. 378; *Hughes v. Hannibal, etc. R. Co.*, 66 Mo. 325. But even to trespassing animals the landowner owes a duty not to inflict intentional harm. *Campbell v. Great Western Ry. Co.*, 15 U. C. Q. B. 498. He owes a further duty to exercise reasonable care to avoid active injury to them after their presence is discovered. *Herrick v. Wixom*, 121 Mich. 384, 81 N. W. 333. *Contra, Maynard v. Boston & Maine R. Co.*, 115 Mass. 458. Many courts extend this duty to situations where the presence of trespassers is reasonably to be anticipated. *Bullard v. Southern Ry. Co.*, 116 Ga. 644, 43 S. E. 39; *Whelan v. Baltimore & Ohio R. Co.*, 70 W. Va. 442, 74 S. E. 410. For the same reasons of policy that dictated the repudiation of the common-law rule of liability for trespassing animals, this latter view is peculiarly suitable in states devoted to grazing, and its application to the facts of the principal case would justify the decision even though the animal was trespassing.

SALES — ESSENTIAL ELEMENTS OF SALE — MUTUUM: WHETHER A SALE WITHIN LOCAL OPTION LAWS. — The defendant was convicted of selling liquor in prohibition territory. The alleged purchaser secured a quart of whiskey from him which he later repaid by returning a like quantity. *Held*, that the judgment be affirmed. *Veach v. State*, 159 S. W. 1069 (Tex. Crim. App.).

The transaction in the principal case is a *mutuum*, the exchange of one chattel for another of similar nature. It is not a bailment, for under the common-law view the transferee acquires title when his obligation is not to return the specific thing but one like it. *South Australian Ins. Co. v. Randell*, 6 Moore's P. C. N. S. 341; see *Foster v. Pettibone*, 7 N. Y. 433, 435. It is true that a bailment can be created without a right to regain the specific article, provided some continuous right *in rem* is retained, as where grain is mingled in a common mass in a warehouse. *Ledyard v. Hibbard*, 48 Mich. 421. But in the principal case the defendant transferred the whiskey outright and retained no such right *in rem*. Granting, then, that there was a transfer of property by the defendant, the question remains whether it was a sale within a statute providing punishment for "whoever shall sell intoxicating liquor." TEXAS PENAL CODE, Art. 402. Such has been held a sale in Massachusetts. *Howard v. Harris*, 8 Allen (Mass.) 297. A later civil statute in Texas making it illegal to "sell, exchange, or give away" liquor in dry territory supports the above interpretation of the criminal statute. SAYLE'S TEXAS CIVIL STATUTES, Art. 3396. Barter is likewise held a sale within the Statute of Frauds. *Franklin v. Matao Gold Min.*

Co., 158 Fed. 941. A transfer of personalty for other personalty than money may not constitute a sale for every purpose. See *Thornton v. Moody*, 24 S. W. 331, 333 (Tex.). But the sort of transaction indulged in by the defendant in the principal case falls within the intended prohibition of the local option laws, and the decision seems correct.

STATUTE OF FRAUDS — SUFFICIENT MEMORANDUM — SIGNED BY DEFENDANT ONLY. — The memorandum of a contract for the sale of grain was signed by the vendor, but not by the vendee, who seeks to enforce it. The Idaho statute of frauds provides that such an "agreement is invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party charged, or by his agent." REV. CODES, IDA., § 6009. Held, that the plaintiff, not having signed himself, may not recover. *Kerr v. Finch*, 135 Pac. 1165 (Ida.).

Both this decision and the one it follows are admittedly against the great weight of authority. *Kerr v. Finch*, *supra*, 1165; *Houser v. Hobart*, 22 Ida. 735, 127 Pac. 997. The provision in question is practically § 17 of the Statute of Frauds (St. 29 Car. II, c. 3). The same question arises where it is sought to charge a vendee when he but not the vendor has signed. *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25; *Mason v. Decker*, 72 N. Y. 595; so too where the subject matter is realty. *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979; *Richards v. Green*, 23 N. J. Eq. 536. The overwhelming majority of cases construes the "party charged" to mean the one sued on the agreement. *Schneider v. Norris*, 2 M. & S. 286; *Bristol v. Mente*, 79 N. Y. App. Div. 67, affirmed 178 N. Y. 599; *Morrison v. Broune*, 191 Mass. 65, 77 N. E. 527; *Harper v. Goldschmidt*, 156 Cal. 245, 104 Pac. 451. Idaho and Michigan, however, find a fatal want of mutuality under these circumstances. *Houser v. Hobart*, *supra*; *Wilkinson v. Heavenrich*, 58 Mich. 574, 26 N. W. 139. This view patently overlooks the fact that the statute concerns the proof, and not the existence, of the bargain, for the memorandum does not constitute the contract, but only evidences it. *Thayer v. Luce*, 22 Oh. St. 62; *Charlton v. Columbia Real Estate Co.*, 67 N. J. Eq. 629, 60 Atl. 192. The court here, indeed, asserts that the local statute has changed the substantive law in this respect also. But it is submitted that the use by the legislature of words already construed almost everywhere to have a certain meaning, shows an intent to use the words in that sense. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766. See *Rhoads v. Chicago & Alton R. Co.*, 227 Ill. 328, 334, 81 N. E. 371, 373. The court's argument, that it is unjust to allow the holder of a signed memorandum to insist on or deny the contract as he chooses, should be addressed rather to the legislature.

TENANCY IN COMMON — CO-TENANT'S LIEN INFERIOR TO A PRIOR MORTGAGE LIEN. — Prior to a partition suit by one tenant in common the other co-tenant mortgaged his undivided share. Held, that the mortgagee's lien on this undivided share of the land was superior to the co-tenant's lien on that share for his portion of the rents and profits collected. *Knecht v. Knecht*, 58 Oh. L. Bull. 680.

A tenant in common holds the legal title to an undivided share of the property. See 1 TIFFANY, REAL PROPERTY, § 163. Consequently a mortgage by one will attach only to the mortgagor's undivided share. See *Bigelow v. Topliff*, 25 Vt. 273, 286. It is unsettled whether one co-tenant has a lien for rents and profits on the other co-tenant's share of the land. Some courts deny any lien whatsoever. *Vaughan v. Langford*, 81 S. C. 282, 62 S. W. 316; see cases collected in 17 AM. & ENG. ENCYC. 697. But, on the other hand, a few jurisdictions do recognize an equitable lien. *Hannan v. Osborn*, 4 Paige (N. Y.) 336; *Beck v. Kallmeyer*, 42 Mo. App. 563; *Arnell v. Munmerlyn*,



71 Ga. 14. See *Peck v. Williams*, 113 Ind. 256, 260. Such a lien is merely a remedy to prevent unjust enrichment. See *Arnold v. Porter*, 122 N. C. 242, 244, 29 S. E. 414, 416. No doubt the co-tenant out of possession has a personal claim against the other for his proportionate share of the proceeds. *Culler v. Carrier*, 54 Me. 81. But these rents and profits spring out of the common estate, and the claim for them is so closely connected with the land that it seems more just that a preference be given as to this land over the other co-tenant's general creditors. The reasoning is analogous to that on which a vendor's lien is based. In the same way in owelty of partition by giving an equitable lien on the purport. *Baltimore & Ohio R. v. Trimble*, 51 Md. 99. It is submitted therefore that a lien should be given here. But as the lien is imposed only in equity, the mortgage should be preferred. *McArthur v. Scott*, 31 Fed. 521. One court argues that the mortgagee takes with constructive notice of the rights of the co-tenant, and so is postponed. See *McCandless' Appeal*, 98 Pa. 489, 494. But it seems unjust to charge one with notice of a lien unrecorded, the very existence of which may be impossible for the mortgagee to discover due to his inability to learn the state of accounts between the co-tenants, which may not even be known to themselves. The Missouri and Indiana courts, in saying (*Beck v. Kallmeyer*, *supra*, *Peck v. Williams*, *supra*) that each co-tenant, being seized *per my et per tout*, holds a contingent interest in the entire title which neither can encumber until their equities are adjusted, allow what is substantially a legal lien, although speaking of it as an equitable lien. This is open to the same objection of public policy against giving preference to a right of so indefinite a nature. The result of the principal case, therefore, seems correct.

TORTS — UNUSUAL CASES OF TORT LIABILITY — APPLICATION OF RULE OF *FLETCHER v. RYLANDS* TO ACTS UNDER PUBLIC FRANCHISE. — The defendant maintained high pressure water mains in the public streets under a private act of Parliament providing that nothing in the act should exempt the company from liability for any nuisance caused by it. The plaintiff's electric cables under the same streets were damaged by the bursting of the defendant's mains without negligence on the part of the defendant. *Held*, that the defendant is liable for the damage. *Charing Cross, etc. Electricity Supply Co. v. London Hydraulic Power Co.*, [1913] 3 K. B. 442.

In England, and in those American jurisdictions accepting the doctrine of *Fletcher v. Rylands*, a landowner is not held absolutely liable for damages resulting from non-natural and hazardous user of land in undertakings conducted under express public authority, apparently on the ground that the legislature contemplated possible damage and condoned it by anticipation. *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Lake Shore & M. S. Ry. Co. v. Chicago, L. S. & S. B. Ry. Co.*, 48 Ind. App. 584, 92 N. E. 989. A sound basis for these cases, however, seems to be that the public interest in the undertakings makes unwise the application to them of the exceptional doctrine of *Fletcher v. Rylands*. Where, however, as in the principal case, the words of the statute expressly negative the company's exemption from liability for any nuisance, the courts have held the company responsible, regardless of negligence, for damages caused by the hazardous user. *Midwood & Co., Ltd., v. Manchester Corporation*, [1905] 2 K. B. 597. Though it is doubtful if the word "nuisance" can be construed to cover what is not nuisance at all, it is apparent from the history of the cases that the legislature intended to hold the company to a strict liability and hence inferentially abrogated the rule that the public interest makes the doctrine of *Fletcher v. Rylands* inapplicable. The fact that the parties in the principal case are not adjoining landowners but co-users of the highway affords no basis for distinguishing this case from *Fletcher v. Rylands*, since both the plaintiff and the defendant have undoubted rights in the land, and the hazard-

ous user by one has caused interference with the rights of the other. See *National Telephone Co. v. Baker*, [1893] 2 Ch. 186, 199.

**TORTS — UNUSUAL CASES OF TORT LIABILITY — PRICE CUTTING AS A TORT.** — A department store owner, for the purpose of injuring a selling agent in his business, advertised with fraudulent representations sewing machines at half price. *Held*, that the defendant's conduct is actionable as a malicious injury to the plaintiff's business under the guise of simulated competition. *Boggs v. Duncan-Schell Furniture Co.*, 143 N. W. 482 (Ia.).

For a discussion of price cutting as a tort, see NOTES, p. 374.

**TRADE MARKS AND TRADE NAMES — PROTECTION APART FROM STATUTE — TERRITORIAL LIMITATION ON TECHNICAL TRADE MARK.** — The plaintiff had established a market for flour in certain states under a technical trade mark. The defendant, afterward, in good faith, used the same trade mark in territory in which the plaintiff's flour is yet unknown. The plaintiff seeks to enjoin the further use of the mark in this territory. *Held*, that an injunction will not be granted. *Hanover Star Milling Co. v. Allen & Wheeler Co.*, 208 Fed. 513 (U. S. C. C. A., 7th Cir.).

A technical trade mark, as distinguished from a trade name, is purely arbitrary with reference to the article to which attached, and not simply indicative of its class, description, or place of manufacture, or of the manufacturer's or vendor's name. See HOPKINS ON TRADE MARKS, § 3. Certain cases not too well considered appear to hold that a right to such a mark acquired in one locality may be enforced in any other locality, regardless of the extent of actual good will attaching to the mark. *Derringer v. Plate*, 29 Cal. 292; *Kidd v. Johnson*, 100 U. S. 617; *Hygeia Distilled Water Co. v. Consolidated Ice Co.*, 144 Fed. 139. It is submitted, however, that the principal case is sound in reasoning that protection is extended a trade mark in order to guard the good will with which the mark is identified, rather than the mark alone; and that where a plaintiff's wares are unknown he has nothing to protect. Furthermore, this is the doctrine applied to trade names, and there seems no reason for distinguishing trade marks from trade names in this connection. See *Briggs v. National Wafer Co.*, 102 N. E. 87 (Mass.), discussed in 27 HARV. L. REV. 190.

**TRUSTS — NATURE OF THE TRUST RELATION — DEPOSIT IN BANK FOR SPECIFIC PURPOSE.** — The plaintiff administrator deposited funds in a bank, and took the following receipt: "To be held until vouchers are received from heirs. Then same to be forwarded by bank draft." The bank having failed, he now sues for the money as a trust fund. *Held*, that he may recover. *Carlson v. Kies*, 134 Pac. 808 (Supreme Wash.).

The principal case illustrates the close questions of fact that arise in distinguishing between a general and a special deposit. The decision seems hard to support, inasmuch as banking convenience requires every deposit to be considered general unless the parties expressly contracted that the money be held separate as a trust *res*. *Nichols v. State*, 46 Neb. 715, 65 N. W. 774. *In re Mutual Building Soc.*, Fed. Cas. No. 9,976. Nothing appears in the receipt to clearly negative the bank's presumptive right to mingle. On the contrary, it is a necessary inference from the expressed intention that the money should ultimately be forwarded by bank draft. See 12 HARV. L. REV. 221; 27 HARV. L. REV. 191.

**WITNESSES — PRIVILEGED COMMUNICATIONS — HUSBAND AND WIFE: LETTER RECEIVED AFTER HUSBAND'S DEATH NOT PRIVILEGED UNDER STATUTE PROTECTING COMMUNICATIONS DURING MARRIAGE.** — In a suit on an insurance



policy the defendant company sets up as a defense that the deceased committed suicide. Papers written by deceased to his wife and found by her after his death, in which he gave directions testamentary in nature, were admitted over the plaintiff's objection that they were confidential communications between husband and wife. *Held*, that they were properly admitted. *Whitford v. North State Life Ins. Co.*, 79 S. E. 501 (N. C.).

The principal case is based on a statute that speaks of "communications made by one to the other during marriage," practically the statement of the common-law rule. The interpretation that a communication is not made during marriage because it does not become known to the other party till after the death of the sender seems a narrow construction of the rule, possible only in a court with a decided dislike for this privilege. The fact that the reason often given for the rule, namely, the protection of the marriage relationship (see 4 WIGMORE, EVIDENCE, § 2332), is not present in the principal case, cannot be appealed to in support of denying the privilege, for the attempt to use this as a test would carry one too far in breaking down the privilege. The case is interesting as it seems to be one of first impression.

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## BOOK REVIEWS.

CASES AND OPINIONS ON INTERNATIONAL LAW AND VARIOUS POINTS OF ENGLISH LAW CONNECTED THEREWITH. Collected and Digested from English and Foreign Reports, Official Documents and other Sources, with Notes containing the Views of the Text-Writers on the Topics referred to, Supplementary Cases, Treaties, and Statutes.

PART II. WAR.

PART III. NEUTRALITY.

By Pitt Cobbett. London: Stevens and Haynes. 1913. pp. xxxii-547.

The above comprehensive title-page is descriptive of the book. This title is condensed on the outside cover to Leading Cases on International Law, Pitt Cobbett, Part II. War, Part III. Neutrality. Third Edition.

The treatment of Parts II and III relating to war and neutrality is distinctly superior to that of Part I, relating to peace. (See review, 23 HARV. L. REV. 653.) Not merely is the general treatment superior, but the cases better illustrate the principles discussed and are generally more modern. The book shows clearly the progress toward conventionalization of international law, particularly as relates to war and neutrality. The issue of the book was delayed by the uncertainty of the action of Great Britain on the International Prize Court Convention of 1907 and the Declaration of London of 1909, action which is still uncertain. Many cases which were regarded as authoritative at the end of the nineteenth century have become in the early days of the twentieth century merely of historical interest, because of the general acceptance of conventions. There are also many new names among the cited cases. The Spanish-American, South African, and Russo-Japanese wars furnished new precedents. Indeed the book opens with a presentation of the controversy between Russia and Japan in 1904 in regard to the necessity of notice prior to opening of hostilities. The Hague Convention, 1907, No. 3, relative to the Opening of Hostilities, Article I, is discussed as if translated "the Contracting Powers recognize that hostilities between them *ought not to commence* without a previous and explicit warning," etc. In the appendix where the Convention is given, the more approved translation is followed, viz.: "that hostilities *must not commence*," etc.

The argument for the determining of "enemy character" by domicile rather than by nationality is excellently presented. There is a recognition of international servitudes which some recent writers have hastily presumed to disregard.

Naturally the much-discussed Article 23 (h) of the Hague Convention relative to the Laws and Customs of War on Land receives attention. Article 23 (h) states that it is forbidden "to declare extinguished, suspended, or unenforceable in law, the rights and rights of action of enemy subjects." The German and British interpretation of this article are opposed, and other interpretations are at variance with both. One fact is evident: the next Hague Conference should make the article clear. In general the Anglo-American point of view is supported in the discussion of the effect of war on commercial relations. The provisional and unsatisfactory character of some of the Hague Conventions of 1907, e. g. the Convention relative to Submarine Mines, is made plain, but the rapid development from custom to code with provision for compensation or other penalty in case of violation is not overlooked.

The modern recognition of the rights of aliens is evident in many provisions, but the exclusion of claims for indirect and for consequential damages seems to be generally accepted. The extension of the doctrine of internment to war upon the sea and to vessels of war delaying beyond the conventional period in a neutral port is another of the principles which has been recognized in the twentieth century. There is a full and frank acceptance of the category of "unneutral service" which some authors were disinclined to accept a few years ago. The names of cases suggest the recent precedents in international law. *Kowshing*, *Ryeshitelni*, *Manjur*, *Terek*, *Lena*, *Askold*, *Haimun*, *Quang-Nam*, mingle with the well-known *General Armstrong*, *Peterhoff*, and *Trent*.

Of the Declaration of London, 1909, the author says that it is likely "to become in a great measure the standard of international action in the future." This statement gains ample support from the fact that the provisions of the Declaration of London are now generally introduced into the instructions issued by various states for the government of their naval forces in their relations to neutrals.

While the references to authorities are generally satisfactory, yet in some cases the references are not to latest editions, as of Calvo, Halleck, Heffter, Lawrence, Nys.

Appendices contain the text of most of the Hague Conventions of 1907 and the Declaration of London of 1909. The Index, which is otherwise good, does not refer to these pages.

G. G. W.

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CANADA'S FEDERAL SYSTEM. By A. H. F. Lefroy. Toronto: The Carswell Company. 1913. pp. lxxviii, 898.

This is an interesting commentary on the British North America Act, 1867, and supplemental acts. The Act differs from ordinary constitutions in that it was not adopted directly or indirectly by the persons whom it governs, and in that it may be amended or repealed precisely as any other statute of the British; but nevertheless, as it is an organic act creating an elaborate system of government for a vast region, it may even be termed, as it sometimes is termed, the Constitution of Canada. It differs greatly from the Constitution of the United States. The very form and phraseology remind the reader of a statute, and not at all of a constitution. Hence it is no surprise to fail to find the familiar provisions of the Constitution of the United States. When one looks below the surface, the difference between the legislative powers created by these two instruments — the two instruments governing almost the whole of one continent — becomes still more striking. Although in each instance we find a Federal Government and State or Provincial Governments, nevertheless in



Canada the position of the Federal Government differs essentially from the position of the Federal Government in the United States. As the author says, "the possession by the Federal Government of the veto power over provincial legislation is one of those special features of the Constitution of the Dominion which distinguishes it from the Constitution of the United States of America." Elsewhere the author explains that in the British North America Act are not contained our familiar provisions as to eminent domain, bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. All these diversities, and other points of interest, may be found in paragraphs 12, 24, 31-33, and 51-53, and on pages 30-44, 84-85, 101, 125, 230, 394, 417, and 742-758. These references will enable any one to gain from the book a quick perception of the peculiarities of the Canadian system, from the point of view of the United States. The necessary documents, including the British North America Act, 1867, are given in an appendix, and on pages 787-791 may be found sections 91 and 92, which are the principal passages of that Act which show the respective powers of the Dominion and of the Provinces.

Although a commentary on the British North America Act, 1867, unlike a commentary on the Commonwealth of Australia Constitution Act, 1900, cannot cite many cases from the United States and cannot much resemble a commentary on our own Constitution, nevertheless this volume should attract attention in the United States, since it is a lawyer-like piece of work and serves excellently the desirable end of presenting clearly the governmental system of neighbors with whom our relations are constantly growing more intimate.

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NATIONAL SUPREMACY: TREATY POWER *v.* STATE POWER. By Edward S. Corwin. New York: Henry Holt and Company. 1913. pp. viii, 321.

There are so few books dealing with the border-land between International Law and Constitutional Law that this volume must be welcomed. Near the beginning (p. 8) the author draws clearly the distinction between holding that a treaty is "legally binding upon the United States as a person at International Law" and holding that it is "legally binding upon all individuals and things subject to the jurisdiction of the United States." The discussion of this distinction is presented so well as to arouse an expectation that the whole volume may be a useful contribution. Yet the remainder of the volume is principally devoted to familiar generalities and almost equally familiar quotations from judicial opinions; and when the author does deal with concrete problems, as in the instance of the Japanese difficulties in California (Chapter VIII), the discussion is inadequate and unconvincing.

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PRINCIPLES OF THE LAW OF PERSONAL PROPERTY. Intended for the Use of Students in Conveyancing. By the late Joshua Williams. The Seventeenth Edition, by his son, T. Cyprian Williams. Toronto: The Carswell Company. 1913.

The treatises on the Law of Real Property and on the Law of Personal Property by that master of the Common Law, the late Mr. Joshua Williams, as edited by his accomplished son, have for their accuracy, lucidity, and felicity of expression won the despairing admiration of legal text-writers. The present edition sustains the reputation of its predecessors.

The mass of Victorian legislation affecting the Law of Personal Property is great, and has of course to be taken account of by Mr. Williams. Many pages of this edition have, therefore, no direct application on America, but there is much besides that has a real and lasting value here.

J. C. G.

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## DUTY TO SEEN TRESPASSERS.

MAY the seen trespasser recover for injuries alleged to have been negligently inflicted upon him by the active intervention of the landowner?<sup>1</sup> Some authorities say yes, others no. For convenience in discussion the former may be called the Michigan rule, the latter the Massachusetts rule. By the Michigan rule the fact that the trespasser's presence is known has an important relation to the burden of conduct imposed upon the landowner. He is thereafter bound to exercise ordinary care with reference to the intruder. "Where a trespasser is discovered upon the premises by the owner or occupant, he is not beyond the pale of the law, and any negligence resulting in injury will render the person guilty of negligence liable to respond in damages."<sup>2</sup> By the Massachusetts rule, as usually stated, he is under no such obligation; his sole duty being to abstain from intentional injury. "The conduct which creates a liability to a trespasser in cases of this kind has been referred to in the books in a variety of ways. . . . Plainly it is something more than is necessary to constitute the gross negligence referred to in our statutes and in decisions of this court. The term 'wilful negligence' is not a strictly accurate description of the wrong. But wanton and reckless neg-

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<sup>1</sup> The term "landowner" is used throughout this article to designate one in the possession of land, whether it be as owner of the fee or under a lesser right. It includes all against whose possession the trespass is an offense.

<sup>2</sup> *Herrick v. Wixom*, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333 (1899).



ligence in this class of cases includes something more than ordinary inadvertence. In its essence, it is like a wilful, intentional wrong."<sup>3</sup>

The rule of non-liability to unknown and unsuspected trespassers for injuries inflicted upon them has hardly ever been doubted. While the true ground upon which the conclusion rests has not always been stated, yet it seems now to be generally recognized. The defendant is not liable, because he has not been guilty of a breach of any duty owed to the plaintiff.<sup>4</sup> This bald statement of the law's conclusion on the matter is all that is ordinarily needed in that class of cases. It is usually enough to know that a recovery is denied. But when we pass to the more troublesome questions touching the rights of trespassers whose presence is known, it becomes desirable to ascertain the reason why there is no duty to use care toward the unknown but actually present trespasser. Is the reason one equally applicable in both cases? If so, of course one plaintiff should stand no better (or worse) than the other. But if the reason for the rule as to unknown trespassers is found to be the lack of knowledge of the situation, then there is good ground for applying a different rule in cases where the reason for this one does not exist.

It may aid in the subsequent discussion to call to mind some of the elements of negligence as defined in law. The actor is judged by an external standard. "The law works only within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience."<sup>5</sup> Once it was thought this standard varied with varying situations, and degrees of negligence were laboriously if not very practically defined. But we are long past this stage of the law, in theory at least. It is now seen that one standard should apply in all cases. Ordinary care under the circumstances fits every case, and leaves the variation where it belongs. The precaution required is greater or less in proportion to the environment of the actor. If the existence of

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<sup>3</sup> *Bjornquist v. Boston & Albany Railroad Co.*, 185 Mass. 130, 134, 70 N. E. 53 (1904).

<sup>4</sup> Judge Jeremiah Smith, in 25 HARV. L. REV. 238, 242 *et seq.*; *Garland v. Boston & Maine Railroad*, 76 N. H. 556, 86 Atl. 141 (1913).

<sup>5</sup> Holmes, *Common Law*, 110.

circumstances is in doubt, the facts are settled in the usual way. So, too, if the sufficiency of the acts done or omitted to satisfy the standard is questionable, that issue is left to the jury.

Is the rule of ordinary care under the circumstances of universal application, or are there instances where it does not apply? The logical answer is that the rule should have no exceptions. Calling as it does for reasonable conduct, and no more, why should there be any situation in which it is not the true guide to and test of lawful conduct?

It may be said that the unanimous holding that there is no duty to use care toward the unknown trespasser shows that the rule is not universal. But there is no exception here, for the presence of the unknown trespasser is not, either in law or in fact, a circumstance which ought to or could influence the landowner's conduct. Conduct is influenced by the impression made upon the individual by what he knows, or thinks he knows. Sometimes the law says what he ought to know is to be added to his actual information. But neither in fact nor by fiction of law is one charged with knowledge not possessed, and which he is not in any sense in the wrong for not possessing. The presence of the unknown trespasser is not a circumstance as the word is here used.

It is dangerous to strike a stick of dynamite. But if one strikes it reasonably believing it to be a bit of kindling wood, his act is not shown to be wrongful by proving the concealed ingredients of the object dealt with. He was not called upon to act with reference to dynamite.<sup>6</sup>

The stereotyped statement of the rule that as to the unknown trespassers the landowner owes no duty to use care, is likely to mislead. It more than half implies that the situation is one where care could be exercised, if the law demanded it. But their unknown presence is to him the equivalent for their absence. It is non-existent as to him. It is not related to his acts and therefore cannot control or modify his conduct. How could one use care towards a person or an object whose existence was unknown and unheard of? "A choice which entails a concealed consequence is as to that consequence no choice."<sup>7</sup>

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<sup>6</sup> "Relatively to a given human being, anything is accident which he could not fairly have been expected to contemplate as possible and therefore to avoid." Holmes, *Common Law*, 94.

<sup>7</sup> Holmes, *Common Law*, 94.



If it be urged that the landowner should proceed with caution upon a vague general theory of always looking ahead, how much is he to take heed to his ways? The duty is to use care proportionate to the reasonable apprehension of danger to others. Where there is no reason to apprehend any danger, because no persons are or are likely to be present, one factor is lacking, and the amount of care required is reduced to zero. But when this factor is present, it inevitably follows that a result expressed in positive terms will be reached. Toward known circumstances one can and should act reasonably. It is impossible to act toward unknown facts.

So far as the unknown trespasser is concerned there is no exception to the rule of ordinary care, and we come to the case of the known trespasser with a rule as yet unimpaired. If the Massachusetts rule as to the seen trespasser is the correct one, then it is true that the rule of ordinary care is not universal, and a time comes when one may lawfully fail to use such care toward a person whose presence is clearly understood. So long as the actor stops short of inflicting an intentional injury, he is not a wrongdoer before the law. No satisfactory reason for thus infringing upon the rule of reasonable conduct has been given. The one most frequently advanced is that the plaintiff cannot by his own wrong (*i. e.* his trespass) impose a duty toward him upon the innocent landowner.<sup>8</sup> The plaintiff's wrong may be, and frequently is, a sufficient answer to his claim to recover; but this is because of his fault, not the defendant's freedom from fault.

Why, then, is not the Massachusetts rule well enough in its results? If it is true that the plaintiff's wrong had a part in causing his injury, why should he recover from one who at the most was only a joint tortfeasor with him? There can be but one logical answer to this.<sup>9</sup> When they are joint wrongdoers neither should recover from the other. But cases frequently arise where that is not the situation, cases where the wrong of one is the mere

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<sup>8</sup> It would appear, however, that this is not the reason in Massachusetts, for the doctrine that the landowner is liable only for what is called reckless or wanton conduct is applied in suits brought by licensees, the same as in the case of a trespasser. *West v. Poor*, 196 Mass. 183, 81 N. E. 960 (1907); *Jones v. New York, New Haven & Hartford Railroad Co.*, 211 Mass. 521, 98 N. E. 607 (1912); *Heinlein v. Boston & Providence Railroad Co.*, 147 Mass. 136, 16 N. E. 698 (1888).

<sup>9</sup> Assuming, of course, that the doctrine of comparative negligence is not to be considered.

occasion for, while that of the other is the active cause of, the injury. It is not the purpose of this article to discuss the scope of the "last clear chance" doctrine. It is enough to say that even those jurisdictions where the doctrine has been denied,<sup>10</sup> recognize that there must be some limit to legal causation short of the remote effects of a long past and completed transaction. It is this phase of the subject which courts following the Massachusetts rule have failed to sufficiently consider. It is undoubtedly true that a trespass is a continuing wrong; but unless it is of worse degree (in law) than negligence, there seems to be no valid reason for denying the application of the last clear chance doctrine. The principle applies when the plaintiff's fault consists of a positively illegal act, the same as when his fault is only one of omission.<sup>11</sup>

It is sometimes said that the Michigan rule places the trespasser upon a par with those who are present as of right. But this is not true if the rule is limited as it should be. The fact that the trespasser is a wrongdoer is neither overlooked nor condoned. He is at once told that he must show that at the time of the injury right conduct on his part would not, while like conduct on the defendant's part would, prevent the mishap. For example, the trespasser walking along a single track railroad can at any time get off the right of way. He can cease from his sinning long after the negligent engineer can stop the oncoming train. In such a case there can be no recovery.<sup>12</sup> But if he is walking over a long trestle the situation may be reversed. The engineer may be able to take the steps necessary to avoid trouble long after it has be-

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<sup>10</sup> *Pennsylvania Company v. Sinclair*, 62 Ind. 301 (1878).

<sup>11</sup> *Black v. New York, New Haven & Hartford Railroad Co.*, 193 Mass. 448, 79 N. E. 797 (1907). But while a last clear chance theory is here applied in the case of a trespasser, it is still insisted that even when the plaintiff's wrong has become a mere condition, the duty to use ordinary care under the circumstances is not owed to him. Although it is held that his wrong has ceased to be a cause of the injury, it is still treated as an excuse for lack of ordinary care on the part of the defendant toward a known situation. The fact that the plaintiff is a trespasser is counted against him in double measure. First it relieves the defendant from any obligation to use ordinary care; and beyond that, the plaintiff must show that it has ceased to be a cause and has become merely a condition of the infliction of injury upon him. The injustice of this rule is recognized in a degree by the earlier cases which hold that in actions for wanton wrongs contributory negligence is not a defense. *Aiken v. Holyoke Street Railway Co.*, 184 Mass. 269, 68 N. E. 238 (1903).

<sup>12</sup> *Batchelder v. Boston & Maine Railroad*, 72 N. H. 528, 57 Atl. 926 (1904).



come impossible for the trespasser to escape. In this case he may recover. In both cases the defendant is a wrongdoer. In one he escapes liability because of the concurrent fault of the plaintiff, while in the other that fault merely affords an occasion for the infliction of injury.<sup>13</sup> In a sense it is true that the wrongful act of the plaintiff imposes a duty upon the defendant; but in a broader sense it is not true. It is the plaintiff's present situation that plays a part in imposing the duty. The fact of his presence calls for a certain modification of proposed action. Future action is under consideration, and should be governed by present facts. These facts are not made non-existent by proof that they ought not to exist. They are here, and the landowner must act in reference to them, whether he wishes to or not. They have become a part of the causes moving him to action or non-action. They may have great or little weight in influencing his reasonable conduct; but to say that they have no weight seems a manifest denial of an evident truth. Men do take such situations into account, and take some precaution in consequence.

The trespasser is on a less favorable footing than the invitee in another respect. The landowner is held to the care of the average man in each case. It may be and probably is true that the ordinary man takes more precaution for the protection of those he has invited upon his premises, or of those even to whose presence he only consents, than he would for the benefit of the known intruder. In each case he would act up to the standard fixed by law. Therefore it is not inappropriate to instruct the jury that the fact the plaintiff was a trespasser is one of the circumstances they should take into account in determining the amount of precaution required to make an equivalent for the conduct of the average man. It is equally proper to withdraw certain cases from the jury upon the same ground.<sup>14</sup>

These two propositions seem to differentiate the trespasser quite definitely from the invitee, to put him in a class by himself, and that as distinctly below those who enter rightfully as his wrongful entry ought to require. He must prove that such entry and his

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<sup>13</sup> Cool. Torts, 1 ed., 674.

<sup>14</sup> This position is forcibly argued in some of the cases which apply the Massachusetts rule. *Bjornquist v. Boston & Albany Railroad Co.*, 185 Mass. 130, 70 N. E. 53 (1904).

continued wrongful presence merely furnished an occasion for the defendant's subsequent negligent conduct; and the defendant's conduct is to be judged by that of the average man toward trespassers under similar conditions.

It has been said <sup>15</sup> in connection with this subject that "no distinctions which are not susceptible of clear statement and comprehension, and which when stated do not appeal to common sense, can be of any real value or entitled to a permanent place in the law." That is, the proposition should be one that can be effectively argued to a jury. Certainly this rule squarely meets the test. That men should always be reasonably careful, must be the pole star in that branch of the law which, professedly at least, has its beginning and its ending in reasonable conduct.

But it is further said that while the Michigan rule as to the known trespasser may be well enough, taken by itself, there are great difficulties in also holding that there is no such duty toward unknown trespassers; that the two positions are inconsistent, and one or the other should be abandoned. What, it is asked, is the difference between seeing the trespasser's head through a car window, and seeing the side of a car in which travelers are expected to be, and among whom a trespasser is present?

In the first case the intruder is actually seen. No question of anticipation is involved. His presence is known; and, being known, it inevitably becomes one of the circumstances under which the defendant acts. But in the second case the plaintiff is not seen, and we are at once brought to the question of anticipation. How much ought the oncoming motorman to anticipate? Whose presence had he some knowledge of—the public generally or a certain class? He had no knowledge of the actual presence of the trespasser, and no information of the likelihood of such presence. Wherein, then, is there reason to charge him with notice simply because he knew persons of another class, whose classification was the reason for and justification of their presence, were to be expected? Of course it would be no excuse for failure to anticipate to say that only fat men had appeared before, whereas

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<sup>15</sup> By Dean Thayer, whose stimulating discussion of this subject has been of the greatest assistance to the writer. His idea is more fully expressed in the last number of the Review, *ante*, p. 318. Public Wrong and Private Action, by Ezra Ripley Thayer, 27 HARV. L. REV. 317.



the plaintiff was lean. The classification would fail to classify in any respect material to the question at issue. But when the classification is based upon the same facts as the reason for anticipation, it becomes an essential part of the situation. The motor-man had occasion to anticipate the presence of passengers. Their probable presence was a circumstance with reference to which he was bound to act. On the other hand, the presence of unknown and not to be anticipated trespassers was not a circumstance. Not only is it true that reason does not demand that he act with reference to them, but it is difficult to perceive how he could so act. The distinction between this case and that of the seen trespasser is fundamental. In the case of the seen trespasser his presence became a circumstance (however unwelcome) with reference to which the actor was bound to shape his future conduct, so far as reason demanded.

There are always border line cases which severely test any rule; hence litigation, disagreeing juries, and dissenting opinions. Most distinctions in law are of degree rather than of kind. The question whether it would be better policy on the whole to make men responsible for all the consequences of their acts has not here been taken into consideration. It has been assumed that "the coarse and impolitic principle that a man acts always at his peril,"<sup>16</sup> has not as yet been sufficiently approved by mankind in general to be taken account of in this discussion. It is still true that a line must be drawn somewhere. The adherents of the Michigan rule have sought to draw it by the rule of reason. It appears to them that the Massachusetts doctrine is a denial of the applicability of that rule in certain cases; that it says in effect that an unintended trespass is a greater wrong than negligence, so much greater that its commission makes the doer of the deed an outlaw from the otherwise universal rule of reasonable conduct.

Appeal is also made to authority. It may be said that in most jurisdictions the Massachusetts rule is adopted, or the Michigan rule is denied. A study of the precedents is highly instructive. It illustrates the steady, if often unacknowledged, progress of reason in its advance against an arbitrary rule. It is true that courts in many jurisdictions have declared the Massachusetts rule to be

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<sup>16</sup> Holmes, *Common Law*, 163.

the law; but it is also true that a majority of these courts have applied the substance of the Michigan rule. In a few states the rule less favorable to the plaintiff has been consistently adhered to. Massachusetts is the most notable example of this class.<sup>17</sup> The use of such misleading terms as "wilful negligence"<sup>18</sup> has been disapproved of, and it is said that the wrong is "in its essence . . . like a wilful, intentional injury."<sup>19</sup> In these jurisdictions proof of negligence, even of "gross negligence," is not enough.<sup>20</sup>

But many of the cases from other states which declare an adherence to the form of the rule deny its substance, when it comes to a practical application. For example: A declaration that negligence is not wilfulness, and that the landowner "owes the trespasser no protection against negligence," seems a strong statement of the Massachusetts rule. But when this is immediately followed by a holding that it does "owe him the duty of all reasonable effort to avoid injuring him when his presence and his own inability to avoid injury are known to it,"<sup>21</sup> it becomes evident that the Michigan rule is the one in fact applied.

One other instance will suffice to illustrate the point. "The only duty the company owed him was not to wantonly or wilfully injure him. Had its employees seen him in time to save him, it would have been their duty to use ordinary care to do so."<sup>22</sup> These and other cases, of a similar tenor, show that, consciously or unconsciously, courts are impelled toward the rational rule of conduct, even in the face of a supposed legal principle to the contrary.

Judge Cooley seems to have entertained the view that calling negligence recklessness added something to the situation. "If,

<sup>17</sup> The tendency of the earlier cases in that state was toward the Michigan rule. In *Lovett v. Salem & South Danvers Railroad Co.*, 9 Allen 557 (1865), that rule is stated with approval. But the rule now applied was announced a few years later, apparently upon the authority of cases relating to the condition of premises, and without considering whether a different principle applied to cases of active intervention after the trespass was known to the defendant. *Johnson v. Boston & Maine Railroad*, 125 Mass. 75 (1878); *Morrissey v. Eastern Railroad*, 126 Mass. 377 (1879).

<sup>18</sup> *Barstow v. Old Colony Railroad Co.*, 143 Mass. 535, 10 N. E. 255 (1887).

<sup>19</sup> *Bjornquist v. Boston & Albany Railroad Co.*, 185 Mass. 130, 70 N. E. 53 (1904).

<sup>20</sup> *Santora v. New York, New Haven & Hartford Railroad Co.*, 211 Mass. 464, 98 N. E. 90 (1912).

<sup>21</sup> *Parker v. Pennsylvania Company*, 134 Ind. 673, 34 N. E. 504 (1893).

<sup>22</sup> *Huff v. Chesapeake & Ohio Railway Co.*, 48 W. Va. 45, 35 S. E. 866 (1900).



therefore, the defendant discovered the negligence of the plaintiff in time, by the use of ordinary care, to prevent the injury, and did not make use of such care for the purpose, he is justly chargeable with reckless injury, and cannot rely upon the negligence of the plaintiff as a protection." Yet in his next sentence the fallacy is exposed. "Or it may be said that in such a case the negligence of the plaintiff only put him in a position of danger, and was, therefore, only the remote cause of the injury, while the subsequent intervening negligence of the defendant was the proximate cause."<sup>23</sup> Eliminating from the list of supporters of the so-called intentional injury rule, those which qualify it in some such manner as those just quoted, it appears that the authorities are pretty evenly divided.

One other point deserves consideration. The Massachusetts rule is advocated because it is practical. It is said that the proposition it stands for is easily understood and readily applied by juries, while the Michigan rule involves reasoning too subtle and distinctions too fine to be comprehended by those not expert in such matters. And this leads to the inquiry, what does the Massachusetts rule mean? A similar inquiry has often been made concerning the Michigan rule, and the question has been much discussed. Close cases and perplexing situations have sometimes made it appear over refined; and attempts to treat questions of fact as though they were problems in law have led some to the conclusion that the rule is vague and uncertain. On the other hand, it has been assumed in many cases that the phrase "intentional injury" was a very simple one, and hence a very desirable one to incorporate in the law. Is it simple?

An act may be intentional in the sense that the actor understands that he is performing it and wills to do so, yet wishes some of its known consequences might be avoided. Or the intent may go beyond this and include not merely the will to do the act, but also the desire that all the consequences follow. One may often feel compelled to cause results he wishes he could avoid, or he may cause them for their own sakes. He may regret that his passing team will bespatter the foot travelers with mud, yet he must drive on. He does the act intentionally, fully understanding and

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<sup>23</sup> Cool. Torts, 1 ed., 674.

anticipating the results to pedestrians, but without wish to do them harm. Again, he travels on the muddy side of the way when the other side is dry ground, intending to thereby bespatter people on the sidewalk. He drives on the muddy side for that reason. This time his state of mind includes an element which was wanting in the earlier case. If this were the element to which the Massachusetts rule refers there would be no liability unless it were shown that the damage (or some damage) had been done because the defendant desired to inflict injury; or, as has been said in another connection, unless the damage was done "for its own sake."<sup>24</sup>

Such a theory of liability is denied by high authority. "It must be borne in mind that the law only works within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience. A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is action on the wrong side of the line, be that act blameworthy or otherwise."<sup>25</sup> The rule, then, should be stated, not in terms of morality, but of acts permitted or prohibited. The defendant must be judged by the surrounding circumstances, including of course his own knowledge of them (actual or imputed), but excluding the desire which moves him to action.

While some of the cases seem to indicate that state of mind is the important thing, at the same time they say that the state of mind can be shown only by inference from the surrounding circumstances.<sup>26</sup> All of which leads back to the proposition that the test really applied is not state of mind but reasonableness of conduct. The question is not what this man thought, but what ought he to have thought, or apprehended, as a reasonable being? If this position is correct, it follows that mere intent to inflict in-

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<sup>24</sup> *Vegeahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896). Dissenting opinion of Holmes, J.

<sup>25</sup> Holmes, *Common Law*, 110; *Commonwealth v. Pierce*, 138 Mass. 165 (1884).

<sup>26</sup> *Bjornquist v. Boston & Albany Railroad*, 185 Mass. 130, 70 N. E. 53 (1904).



jury is not sufficient to create liability. It must be shown further that such intentional interference with the person of the trespasser was unreasonable. The law is so stated in the leading case just cited. If intent is shown, the lesser and essential element of knowledge that certain consequences will probably ensue is also shown. But this is the only importance<sup>27</sup> to be attached to the fact that the act was induced by an evil purpose.

Two farmers set out to mow their fields. Each knows a trespasser is in his path. One runs the intruder down, with an intent and a desire to do him injury. The other has the same knowledge, and does exactly similar acts, with a belief that the trespasser in his field will get out of the way, and without desire or intent to inflict injury. If the actor's state of mind were the test, the first would be liable and the second not liable. But the question of liability in the second case would not be disposed of on these facts alone. There would be further inquiry as to whether there was any reasonable ground for the defendant's complaisant attitude.<sup>28</sup> If there was not, the jury would be told that he is presumed to intend the usual and ordinary consequences of his act, — that they should find, contrary to the fact, that he intended the result which followed his act. Here again the substance is that intent is not necessary at all, but that the landowner's acts are to be judged by the standard of the average prudent man.

Now suppose that in the first case the chance of injury was very remote, so remote that no reasonable man would anticipate it as likely to occur. Is the defendant liable because he believed and hoped it would happen? And if so, which is the important element — his belief or his desire? Manifestly, the former. His belief is his foresight, it is to him a kind of knowledge; and being knowledge, it is one of the circumstances under which he acts and in view of which his conduct is to be judged.<sup>29</sup> But his desire has no such bearing and cannot logically be considered on the question of his guilt. It no more charges him with liability than his neighbor's kindly feeling for the intruders excuses lack of reasonable judgment on his part. Men must act reasonably in

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<sup>27</sup> Except, in some jurisdictions, on the issue of damages.

<sup>28</sup> *Bjornquist v. Boston & Albany Railroad Co.*, 185 Mass. 130, 70 N. E. 53 (1904); *McKeon v. New York, New Haven & Hartford Railroad Co.*, 183 Mass. 271, 67 N. E. 329 (1903).

<sup>29</sup> Holmes, *Common Law*, 57.

their present circumstances. They must foresee as much as the average man. Beyond this, they must use the foresight they actually possess, even when it exceeds that of the ordinary individual. They are judged by their acts, not by how they feel toward any person or thing. The standard is consistently external. Given the surrounding facts, including of course the special knowledge of the party, the only other material questions are, what did he do? and, finally (under the Massachusetts rule), was what he did reckless or wanton?

The test under that rule seems to be found in the degree of danger to be apprehended from the act. If the danger is non-existent, or nearly so, the conduct may be due care. If the danger is considerable, and the average man would avoid it, there is negligence in the ordinary sense. If the danger is very great, so that the average man would understand not only that it was prudent but necessary to act so as to avoid it, then the act is called wanton or reckless.

The standard of the average man is not to be used by the jury in testing liability under this rule. That standard is available to determine what the defendant ought to have known and anticipated, but for the ultimate question — was what he did actionable? — some other test is employed. It seems to be this: was the act one that a reasonable man would have understood involved seriously and unreasonably endangering life or limb? This is the test given for criminal negligence,<sup>30</sup> to which the present wrong is likened.<sup>31</sup> Even here the factor of reasonableness is not entirely gotten rid of, yet it is not now the test. The test is the imminence of the danger. Just what degree of danger is so great that invoking it may be termed wanton or reckless conduct seems incapable of further definition.

While it is said that the fault must be something greater than the gross negligence sometimes spoken of in statutes and decisions, yet the fact remains that it may consist of inadvertence. It is the failure to come up to the standard of conduct which has been set. "Reckless negligence"<sup>32</sup> is only the failure to use the care the law

<sup>30</sup> *Commonwealth v. Pierce*, 138 Mass. 165 (1884).

<sup>31</sup> *Aiken v. Holyoke Street Railway*, 184 Mass. 269, 68 N. E. 238 (1903).

<sup>32</sup> *Bjornquist v. Boston & Albany Railroad Co.*, 185 Mass. 130, 134, 70 N. E. 53 (1904).



requires under the circumstances. To say to a jury that the defendant must have used the care the law required under the circumstances, and, further, that the care demanded is less than the average man would have used in the same situation, sounds odd, to say the least.<sup>33</sup>

Examining the cases applying this rule by the light of Dean Thayer's test, it seems inherently defective. How is it to be defined or limited, so that a jury may intelligently apply it to the evidence? The task has not been found an easy one by judges sitting at *nisi prius*; and even the court *en banc*, after the matter had been fully discussed in several opinions, came to the conclusion that "it is not easy to explain to a jury the nature of this liability."<sup>34</sup> The trouble is not with the judges, but with the rule they are set to apply. The rule says, first, that the injury must be intentional, and, second, that the defendant's intention is not an essential element. The wrong may consist of negligence, but it must be greater than gross negligence. Nothing but confusion can result from the attempt to explain these propositions to a jury. Either it should be held (contrary to the whole trend of the law) that the intent is material and must be proved, or else the rule should be abandoned.

The abandonment of the rule would not affect results as largely as might at first seem probable. In many of the cases where the rule and its application to the evidence in hand have been discussed, it would seem that the same result would have been reached if the court had applied the general rule of ordinary care under the circumstances. The trend of the argument in these cases is toward the conclusion that there was nothing in the conduct complained of which was other than that of the ordinary man having the same situation to deal with. Applying to the evidence the strict rule obtaining in these jurisdictions as to what amounts to proof of negligence, the conclusion would be reached that there was no failure to use ordinary care under the circumstances.

Assuming, however, that the rule has a substantial and practical basis, how does its application avoid the difficulty thought to be incident to applying the Michigan rule? The only difficulty there seems to be on the issue of what one ought to anticipate; and

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<sup>33</sup> *Grill v. General Iron Screw Collier Co.*, L. R. [1866] 1 C. P. 600.

<sup>34</sup> *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594 (1905).

the principle that one must anticipate as much as the average man would foresee, applies equally under either rule. Difficulties which arise in the application of one rule must be dealt with in applying the other.

Go back to the example of the two trolley cars, one containing a trespasser whose head is seen through the car window by an oncoming motorman, the other car not seen by the motorman, but reasonably to be expected, with its crew and passengers. In fact an unknown and unsuspected trespasser is among these passengers. If under the Michigan rule the motorman ought (as some think) to be held guilty of neglect toward the trespasser in the second case, because he knew passengers might be approaching, why, under the Massachusetts rule, should his conduct not be called reckless toward the trespasser because it is so as to the passengers? If under the Massachusetts rule he is not in fault as to trespassers until he has notice of their presence, why should he be under the Michigan rule?

A distinction has sometimes been thought to lie in the proposition that under the Massachusetts rule there was liability only for intentional wrong, and that there could be no intent when there was no knowledge, actual or imputed. But it appears that this so-called intent is not a state of mind actually existing. It is merely a part of a rule forbidding acts under certain circumstances. Like the rule of ordinary care, it is an external standard. If under the Michigan rule acts can be deemed negligent as to A. because they are so as to B., why, under the Massachusetts rule, may not acts which are reckless as to C. be so treated as to his companion D.? Indeed, there is moral ground for the argument that the liability to D. should exist when it ought not as to A.<sup>35</sup>

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<sup>35</sup> An outcropping of this idea that in the so-called intentional wrong cases there is some element of moral turpitude, not to be found in negligence cases generally, is the rule sometimes announced that contributory negligence is not a defense. *Aiken v. Holyoke Street Railway*, 184 Mass. 269, 68 N. E. 238 (1903). Of course the direct and immediate tendency of the act to produce the result, which is required to make the act wanton or reckless, will ordinarily preclude the possibility of contributory negligence; but cases may arise when it will exist. And since the wantonness or recklessness does not depend upon a state of mind, but may consist wholly of inadvertence, it follows either that contributory negligence is a defense, or else that the doctrine of comparative negligence is approved of. In *McKeon v. New York, New Haven & Hartford Railroad Co.*, 183 Mass. 271, 67 N. E. 329 (1903), the discussion seems to imply that



It is, then, merely a question of which is the more just, logical, and workable rule of conduct, — that which always applies the standard of reasonableness, or that which makes an exception to the rule.

It has seemed to some courts, and rightly, that acts which create a liability to an invitee ought not to impose one in favor of a trespasser. The error came in the assumption that the rule of ordinary care under the circumstances, if invoked in favor of the trespasser, would bring about such an unjust result. There has been a failure to recognize that the rule of ordinary care is only that of average conduct; that it may be true that the average man does not take the same precautions for a trespasser as he does for his guest; and that in no case can the trespasser recover save by showing that at the time of injury he could not, while the defendant could, prevent the damage by acting according to legal standards. Failing to perceive that the application of these principles would work out justice, and feeling instinctively that something must be wrong in a rule which placed the tramp on an equal footing with the guest, a remedy was sought in the use of the confusing and philosophically meaningless term "intentional injury."

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contributory negligence is a defense; and *Black v. New York, etc. Co.*, 193 Mass. 448, 79 N. E. 797 (1907), limits the exception so that it merely makes a *prima facie* case for the plaintiff on the issue of his own care, and declares that a recovery is allowed only upon a last clear chance theory.

## FAIR VALUE FOR RATE PURPOSES.

IT has frequently been stated that there can be no rule or formula for the determination of fair value for rate purposes. Each case must be considered on its own merits, and such result or value arrived at as may be "just and right in each case." "It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."<sup>1</sup> "We take it that any value is a fair value which fair and reasonable men would say ought to be attached to the property, under all the circumstances of the particular case, for the purpose of measuring the return which the public should pay to the owner."<sup>2</sup>

The Supreme Court has gone no further than to mention some of the elements to be considered in determining fair value. In *Smyth v. Ames*<sup>3</sup> Justice Harlan points out that "the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as is just and right in each case." The court, however, is careful to add that there may be other elements besides those enumerated that should be taken into consideration, and gives no indication as to how these various factors are to be combined to produce the final result. It does not indicate the relative weight to be attached to the various elements, nor does it indicate that in a particular case any weight need attach to certain of the elements.

Those who realize the complexity of the problem are agreed that it is fortunate that the courts, and particularly the United States Supreme Court, has not attempted as yet a more illuminating definition of "fair value." It is recognized that the entire problem is in a developmental stage, and that there is danger of creating

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<sup>1</sup> The Minnesota Rate Cases, 230 U. S. 352, 434 (June 9, 1913).

<sup>2</sup> Application for approval of sale of Berlin Electric Light Company, Dockets No. 130 and 131, decided August 20, 1913, New Hampshire Public Service Commission.

<sup>3</sup> 169 U. S. 466, 546, 18 Sup. Ct. 418 (March 7, 1898).



precedents that may compromise future action when the entire problem has been more fully disclosed.

This attitude, however, while proper under the circumstances, should not be considered final. While fair value can never be a matter of mathematical formula, its normal content should be defined. Public interest demands that the relation between the public utility and the public should be put on a more permanent and dependable basis.

Investors in putting their money into public utility enterprises are entitled to know whether, in case the utility is appropriately located and normally successful, it will be permitted to earn a return on the actual and necessary investment, or upon the cost of reproduction, or upon the market or exchange value of the property, or upon a combination of these or other factors. Any arrangement might conceivably be fair to the company and fair to the public provided it were known in advance, so that reciprocal relations between risks involved and returns secured might be established, and proper methods of accounting for depreciation and appreciation instituted. For the future at least it is clearly essential that some one standard should be adopted as the normal and controlling standard in determining fair value. As to the past, the situation, while more complicated, still points to the desirability of definitely choosing some standard.

In considering fair value for rate purposes it is important to bear in mind that the determination of fair value is a part of the process of determining a reasonable rate of charge. The content of fair value may therefore depend largely on our conception of what constitutes rate reasonableness. It will aid to a clearer determination of this intricate problem if for the moment we forget "fair value" and concentrate our attention on the fundamentals of a reasonable rate of charge. By "reasonable rate" as here used we mean the reasonableness of the rate schedule as a whole, and not the adjustment of the various specific rates that go to make up the complete rate schedule. It is the total price or compensation collected from the public for its entire service, rather than the price for any particular service or class of services. A reasonable rate of charge in this sense of a reasonable rate schedule is a rate that gives the company reasonable compensation for the entire service which it renders the public.

Reasonable compensation must be reasonable to the public. It cannot be more than the service is fairly worth to the users, or more than they can be justly called upon to pay under all the circumstances of the case. Reasonable compensation should, moreover, constitute a fair return to the company for the service rendered. It must be just to the public and should be just to the company; but if it cannot be just to both it must in any event be just to the public. Normally there is no conflict, for a rate that is just to the company is also just to the public. It is for the most part only in cases where there has been poor judgment in the establishment of an enterprise, or changed conditions have rendered it inappropriate, that a rate which offers only a fair compensation to the company is unjust to the public. For the normal successful public utility enterprise the reasonable rate of charge is the rate that affords the company a reasonable, and no more than reasonable, compensation for its entire service to the public.

What, then, is reasonable compensation in the case of the appropriate and normally successful public utility enterprises? Reasonable compensation is here equivalent to the normal cost of production. What other basis can there be for the determination of a fair price in the case of a virtual monopoly?

If a commodity can be freely and quickly produced, its market price will follow quite closely its cost of production. This must be so, because under the assumed conditions there could be no reason for paying more than the cost of production.

If a commodity may be freely produced, but only by specially trained workmen, a large fixed investment, and great business risks, the cost of production will still in the long run *tend* to limit market price. It is clear that the production of a particular commodity will not be permanently carried on unless the price received covers all the costs of production. Under free competition it is also clear that a price higher than that necessary to cover special risk, interest, profits, and operating expenses will bring new capital into the industry, and thus bring the price down to the cost of production. For a freely produced commodity, therefore, a price that does not conform to cost of production is not a stable or normal price. In a static society, with perfectly free competition the market price would conform to cost of production. In our present highly dynamic society, with many actual limitations upon



perfect freedom of competition, market price and cost of production are often very far apart. Economists have used the term "normal price" to indicate in the case of a freely produced commodity that price that corresponds to cost of production. It is the normal price, because it is the price toward which market prices tend; it is the price that under assumed conditions would be stable.

The above presupposes competitive conditions. In the case of unregulated virtual monopoly the force that tends to limit prices charged to the cost of production is lacking. This creates the necessity for public regulation of the rates of charge of public service companies. The aim of public regulation is to accomplish what in other industries is assumed to be accomplished automatically by free competition, that is, to limit the price charged to the normal cost of production. In the case of authorized and regulated monopoly, ordinarily the reasonable rate of charge will correspond exactly to the economist's conception of normal price. The reasonable rate is ordinarily the one fixed by the normal cost of production. It is fixed by normal operating expenses plus a normal rate of return on a normal capital cost. Normal cost is ordinarily the determining factor in fixing fair, reasonable, or normal prices in the case of a regulated monopoly.

There is no reason why in the case of a virtual monopoly the public should be required to pay more than the normal cost of production, and sound reason why in the long run the public cannot pay less. Normal cost of production is the amount which in the long run it is necessary to pay to secure the utilities demanded by the public. It is the amount that will secure an equilibrium between demand and supply.

In the case of a commodity requiring no capital outlay the normal cost of production is easily determined. It is the present normal cost of the labor and materials entering into its production. Cost consists merely of "operating expenses," and is not complicated by the question of capital cost, and interest and profits thereon.

In the case, however, of a commodity requiring a large fixed investment, the determination of a normal cost of production is a complex process, in the working out of which there is room for a wide divergence of opinion. To the normal cost of labor and materials there must be added a fair estimate for depreciation and a fair return on capital cost. The normal cost of labor and materials

is complicated by the necessity of including provision for maintenance, repairs, and depreciation. The determination of a normal return on a normal capital cost requires a determination of two very difficult and complicated problems: (1) What is the amount of the normal capital cost, and (2) what constitutes a normal return on such amount.

Normal capital cost as applied to a new enterprise is a comparatively simple concept. But what is it as applied to a long established enterprise — to a water supply plant, a gas plant, or a railroad system? Is it normal cost at the time originally installed or last renewed, or, on the other hand, is it the present cost of reproduction? Is it actual cost or reproduction cost? We start with the premise that the reasonable rate of charge is to be determined by the fair cost of production. The point at issue between actual cost and reproduction cost is really whether by cost of production we mean cost at a particular moment or cost averaged over a period of years. In favor of present-moment cost it is asserted that what the public is entitled to is service at a rate of charge sufficient only to pay a fair return, under present investment conditions, upon the capital cost that would be required at present to furnish this service; and, conversely, what the company is entitled to receive is a fair return, under present investment conditions, on the capital cost that it or another company would have to expend at present in order to provide the service. A rate of charge measured on this basis is said to correspond to the present economic cost of the service.

The fallacy in this argument is due to a failure to realize the effect on cost determination of a fixed investment of capital. If a public service could be supplied without a fixed investment it would be true that cost of production could be determined without reference to the past. But these utilities cannot be supplied without a large capital outlay that cannot be withdrawn at will and upon which a certain risk has been assumed in anticipation of an assumed probable return. As the utility can be supplied only in this way, the actual cost of production cannot be determined without reference to these actual conditions. Cost of production determined by the reproduction method is largely hypothetical. It is not based on the actual conditions that limit the production of the utility.



Take the railroad industry. Some billions of dollars have been permanently devoted to this great public service. This capital cannot be withdrawn. The railroad is a fixture. It has created and molded the entire industrial and social development. The location of industries, population, cities, has for the most part been controlled by this factor. It is utterly impossible to conceive of our present social and industrial organization without the railroad. The reproduction cost theory as applied to such an institution is particularly fanciful. How can real cost of transportation be held to change from year to year with the changing reproduction cost of the railroad right of way and terminals? If railroads were in fact entirely reconstructed each year, there would be reason in this method of cost determination. But they are not and cannot be constructed and operated on any such theory. The real cost of transportation can only be determined by recognizing the only process by which transportation service can be supplied, that is, by devoting capital permanently to the enterprise.

The determination of a normal capital cost is one step in the process of determining a normal price, and this normal price is the amount which in the long run it is necessary to pay to secure the utilities demanded by the public. It is the amount which constitutes an adequate inducement for investment. Starting with the necessary investment as a base, the investor will estimate all the risks and hazards of the business, of every kind and nature, and against this will place all the possible chances of profit. The possible rate of return adequate to induce investment is naturally and necessarily a percentage on the actual cost. From the standpoint of the investor, a rate of profit based on any amount that is less than the actual cost is in excess of the actual rate of profit, and a rate of profit based on any amount that is greater than the actual cost is less than the actual rate of profit.

Assume, for example, that a possible annual return of 7 per cent on the actual outlay is reasonable and necessary to secure the establishment of a given public utility. If, however, the annual return is to be based not on actual outlay but on estimated reproduction cost in each year, 7 per cent will be more or less than a reasonable return in proportion as the chances favor an increase or a decrease in reproduction cost. If costs of land, labor, and materials are advancing, and all indications point to a continuance

of such increase, a return of 7 per cent on such increasing cost is more than is reasonable and necessary to secure the establishment of the given enterprise. If on the other hand all indications point to a continuous fall in the cost of land, labor, and materials, the prospect of a return of 7 per cent on such decreasing cost would not be adequate to secure the establishment of the enterprise. To furnish an adequate inducement, either the probable rate of return would have to be increased, or the cost of reproduction standard of determining capital cost would have to be abandoned.

The fair rate of return could be altered so as in a measure to offset the appreciation or depreciation of the base to which such rate of return is applied. With declining prices the risk of depreciation in reproduction cost would be offset by an increase in rate of return, and with advancing prices the probability of appreciation would be offset by a decrease in the rate of return. This, however, is but a poor method of accomplishing what can be more fairly and logically effected by directly basing the rate of return on actual capital cost. Any method that is permanently fair to both parties must get back to actual capital cost as the base for actual as distinct from nominal profits.

It is a fair assumption that, in general, investors in establishing public utilities have looked to a fair return on their actual investment to compensate them for their outlay, and have not taken seriously into account any appreciation or depreciation in the value of land or in the price of labor and materials entering into the reproduction cost of structures and equipment. They have necessarily assumed that they would be able and would be permitted to receive for their service an amount equal to their actual cost of production, *i. e.*, operating expenses, depreciation, and interest and profits on their actual capital outlay.

The normal actual capital cost as a basis for rate determination, moreover, has a distinct advantage from the standpoint of public policy. It is desirable that rate schedules should have stability and should not fluctuate with the price of iron pipe or copper wire or with real-estate activity or reactions. A utility is not established for the purpose of speculating in copper wire or iron pipe or land. It must, however, in furnishing its service invest its money permanently in these things. The utility should not be expected to assume the risks of fluctuations in the price of the land and



materials it uses. The public interest is best subserved and the cost of production is lowered by reducing the risks incident to public utility enterprises. The tendency of modern public service regulation is to establish more definite and equitable relations between the public and the company. These more definite relations mean decreased risk, and decreased risk means decreased cost of production.

The public utility renders a continuous service, and in doing so requires a permanent fixed capital. Both the plant and the business are a gradual growth. This essential continuity of growth and service is the fact that seems to be lost sight of in present-moment reproduction methods of determining cost of production. The service and its present cost are the result of a complex interplay of factors starting with the initiation of the enterprise. Such cost is as much the result of past life and growth as it is of present conditions. Investment, depreciation, operating costs, risk, are all bound up in the past growth and development of the existing utility.

As justifying the reproduction method it may be argued that the public is always entitled to secure service under present conditions as to cost of production. It is entitled to secure service at a rate of charge sufficient only to cover cost of operation, interest, and profits of a substitute plant of the most modern approved design, capable of performing the same service as the existing plant. The company assumes the risk and enjoys the profit, if any, incident to this arrangement. This method involves a reproduction of the service rather than a reproduction of the plant. If the old plant were wiped out, what would it cost at present to construct and operate a plant capable of performing the service now performed by the old plant? In the case of a water plant, perhaps an entirely new source of supply would be used and the distribution system radically changed; in the case of a gas plant, a different process of production employed and a few gas-holders substituted for many small ones; in the case of an electric plant, larger units of production employed; in the case of a railroad, there might be a radical relocation and realignment of roadbed and important changes in the method of construction, leading to great economies in operating cost. It has been stated that "if our railways were to be built anew, in the light of our present knowledge and

with our present traffic offerings and financial resources, vast changes would be made in the character of construction.”<sup>4</sup>

As thus stated, the reproduction method has so many difficulties that it is practically never employed. The reproduction of the service involves not only the determination of the cost of the most efficient substitute plant, but the determination of the present cost of reproducing the business, the proper allowance under present conditions for interest and profit, and the operating costs for the substitute plant. In most cases it is exceedingly difficult and expensive to determine the design of an equally efficient substitute plant. In the case of a railroad, for example, the cost of determining a substitute location and of estimating the operating costs thereon would be so great as to render it entirely impractical as a factor in rate regulation. It would require a careful survey of various available locations, and estimates of construction and operating costs. The engineering costs of such survey and estimates would be enormous.

The cost of reproduction in practice, therefore, instead of meaning the cost of a substitute plant of the most modern approved design, capable of performing the same service as the existing plant, has come to mean the cost of a substantially identical reproduction of the existing plant. This is the usual method. It involves, however, a partial abandonment of the reproduction of the service theory, and a somewhat imperfect recognition of the fact that cost of production is necessarily related to the past as well as to the present and future. It constitutes an imperfect recognition of the necessary continuity in the life of the plant and its service.

By a further modification of the cost of reproduction method, cost of reproduction is made to mean not the cost at present prices of land, labor, and materials of reproducing a substantially identical plant under *present conditions*, but the cost at present prices of land, labor, and materials of reproducing a substantially identical plant under the *actual conditions* under which the existing plant was originally constructed. Under this method expenditures actually incurred in the development of the present property are fully allowed for, even though they would not be met with in the reproduction of an identical substitute plant. On the other hand,

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<sup>4</sup> J. E. Willoughby, in "Proceedings of American Society of Civil Engineers," January, 1911, page 119.



certain expenditures that have not been incurred in the development of the existing property, but would be incurred in the reproduction of the existing property, are excluded. The following is a statement of expenditures that would be included under this interpretation of the reproduction method. "If trees were cleared, then he [the appraiser] must allow for the cost of clearing, although not a tree may now be standing. If streets were graded, then that grading must be estimated, though to-day the entire city is as level as a floor. If quicksand was encountered in laying a pipe-line, then the added cost of excavating it must be allowed, even though subsequent works have drained the line so that it no longer has a yard of quicksand. If money was spent to educate the public to the use of the commodity sold by the corporation, then that money is a development expense which must be allowed, even though the expense would not now be incurred by a new corporation of like character."<sup>5</sup> Pavement over mains laid at the expense of the city, on the other hand, is an example of a reproduction cost that would not be included under the modified rule above mentioned.

The consideration under the reproduction method of piecemeal construction depends upon whether the modified view of cost of reproduction above referred to is adopted. Under a strict application of the reproduction method there would be no occasion for the application of piecemeal methods. The entire property would be reconstructed by the quickest and most economical method. The actual cost of constructing gas mains has doubtless increased where from time to time additional mains have been laid in the same street to meet increased demands. In the laying of telephone conduits and cables by the piecemeal method additional cost is also incurred. On the other hand, certain overhead charges, such as organization, engineering, and interest during construction, may be lower where the property is constructed by the piecemeal process. Various authorities in using the reproduction method have considered it proper to allow for piecemeal construction. To this extent they have abandoned the strict reproduction method.

A strict application of the reproduction method means that interest and profits shall be determined by present conditions. If the existing property were wiped out, upon what terms could

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<sup>5</sup> Discussion by Halbert P. Gillette in "Transactions of American Society of Civil Engineers," 1911, vol. 73, p. 382.

capital be induced to invest in a similar property under existing conditions as to interest and risk? This theory disregards entirely the risk assumed when the existing enterprise was started and when the successive additions to investment were made. Most authorities recognize, however, that a fair return on investment cannot be determined in this way. Consideration must necessarily be given to initial risks and past earnings.

The reproduction method does not fit in with depreciation and accounting methods. The annual allowance for depreciation under approved accounting methods is not the amount required to replace the existing unit, but the amount required to write off the cost of the existing unit when it is necessary to replace it. Under approved methods the actual cost of a car when replaced is deducted from the capital account, and the cost of the new car is added to the capital account. An allowance for depreciation estimated on reproduction cost is consequently inaccurate in proportion as the reproduction cost differs from the actual cost. As long as the science of accounts is predicated on actual cost it is inconsistent and confusing in any proceeding to determine cost of production, to base either the accrued depreciation or the annual allowance for depreciation, on reproduction rather than actual cost.

The question of actual cost has been usually dismissed in connection with valuation cases and discussions by the simple statement that inasmuch as its determination was entirely impracticable any consideration of the subject must be purely academic. This, it seems, has been largely the result of a somewhat confused conception of actual cost. Actual cost properly considered may in a great majority of cases be determined with much greater accuracy than reproduction cost. The term "actual cost" may possibly be taken in three senses: (1) book cost; (2) the first cost of the original units; (3) the first cost of the identical units now in use. The confusion has arisen from identification of actual cost with book cost or first cost of original units, or both. Properly speaking, actual cost is the first cost of the identical units now in use. In the past both the terms "actual cost" and "original cost" have been used, the term "original cost" being more frequently employed. The term "actual cost" should be substituted, as the term "original cost" appears to mean the first cost of the original units.

Book cost would be the same as actual cost, *i. e.*, the first cost



of the identical units now in use, assuming that approved accounting principles had been strictly applied from the initiation of the enterprise. Correct accounting principles are, however, of comparatively recent acceptance and application. Book costs as actually developed often include discount on securities issued, exorbitant profits to promoters, cost of replacing wornout or superseded property, dividends paid out of capital and money sunk in unsuccessful experiments. On the other hand, book cost may exclude various actual costs, such as improvements and betterments constructed out of earnings, and overhead construction charges included in operating expenses.

Original cost, or the first cost of the original units, is extremely difficult of ascertainment in the case of all the older enterprises. Accounts and records are lacking, and even if at hand would not necessarily be illuminating, inasmuch as the accounting principles and methods applied are not in evidence. A particular unit may have been replaced many times; there may be no record of the time when it was originally installed or of the character and quality of the unit when installed. To the first cost of the original unit there would be added or deducted at the time of successive replacements the proportion of the cost of the new unit represented by any increase or diminution in the capacity of such unit. When a street car with a carrying capacity of 24 is replaced by one having a carrying capacity of 30, one-fifth of the cost of the new car would be added to capital cost. When in turn the 30 passenger car came to be replaced by a 40 passenger car, one-fourth of the cost of such new car would be added to capital cost. Thus the determination of original cost in this sense would require a complete knowledge of the physical and accounting history of the enterprise.

If actual cost be taken in the sense of original cost or first cost of the original unit, it may be ruled out as impracticable of ascertainment in the majority of cases. Under approved accounting principles, however, actual cost is not the first cost of the original unit, but the first cost of the identical unit now in use. Under approved accounting methods, when a given unit is replaced, the cost of the replaced unit is deducted from the capital account and the cost of the new unit is added to capital account. Thus the true book cost corresponds with the first cost of the identical unit now in use. This greatly simplifies the problem of determining actual cost.

Assuming that existing accounts and records may be only partially relied upon, an estimate of actual cost can be ascertained by much the same methods and with greater accuracy than an estimate of reproduction cost. The first essential in either case is a complete inventory of property units in use. A second requirement in both cases is the determination of the approximate time at which each such unit was installed. This information is essential under the reproduction method in order to determine the age and accrued depreciation of each unit or class of units. It is essential under the actual cost method in order that unit costs varying with the period of purchase may be applied. Records are available showing for any period the prevailing prices of labor and materials entering into construction costs. From such records, supplemented in many cases by fragmentary data obtainable from the books of the company, it is possible to apply unit costs. In the electrical industries particularly, a large part of the property is short-lived, so that even if records are at hand for the past five or ten years, only data that will fix within narrow limits the actual cost of a large proportion of the existing property can be ascertained. The actual cost of land, even in the case of old enterprises, can often be obtained from the company's records. If such records are entirely lacking, the value of the land at the time of its purchase may be estimated from tax assessments and records of purchases and sales at the time. Such an estimate will, in most cases, come nearer to the true purchase price than present estimates of reproduction cost of the land will come to the true reproduction cost. A succinct statement of the method to be employed by the engineer in estimating actual cost is contained in a recent book by Hammond V. Hayes, entitled "Public Utilities, their Cost New and Depreciation" (at page 108):

"By far the larger part of these difficulties is removed if the original cost is determined in substantially the same manner as was the replacement cost. An inventory is prepared showing all plant units now in useful service. Such an inventory is identical with that required for ascertaining replacement cost. The age of each unit is ascertained and entered in the inventory. As will be explained later, this figure for age is necessary for a determination of the loss in value of the investment arising from depreciation. From this age figure it is possible to find how many units of each class of elements were constructed in each year in



the past. The engineer and an accountant familiar with the company's records can ascertain the unit costs of all elements for each year in the past. The sum of the products of the numbers of units constructed each year by the unit costs for that year will give the original cost. Overhead charges can be found for each year and applied to the cost of construction each year in a manner similar in all respects to that described under replacement cost. Thus it is seen that the method of determining original cost is practically the same as replacement cost, except that in the case of the original cost there are several unit costs, one for each year in the past, for each element, whereas for replacement cost there is but one unit cost applicable to all units of the same kind."

If public service industries were not already long established and our problem was that of devising a general policy that would serve as an adequate but not excessive inducement to obtain the establishment of the desired services, it seems clear that the actual and necessary outlay would naturally be taken as the normal capital cost upon which a fair rate of return would be allowed. The future cost of production of the service in a particular community would therefore depend somewhat on the prices of land, labor, and materials prevailing at the time the particular plant was established or last renewed. This seems natural and fair. The normal price of a virtual monopoly is necessarily something of an average. It cannot be determined wholly without reference either to past or future. The normal price is not the present moment hypothetical cost of production, assuming a reproduction at the present moment of the existing plant. Utilities requiring a large fixed investment cannot be permanently carried on on this basis, with justice to the investor and economy to the public.

But our public service industries have for the most part been long established. A vested right to increments, especially in land values, is claimed. In the past, theories of public control have been but vaguely formulated and very imperfectly applied. Consequently many believe that the cost of reproduction method of determining capital cost or fair value is essential as a starting point, but for the future, fluctuations in the price of land, labor, and materials should result neither in an unearned increment nor an unmerited loss to the investor.

What is equitable and just as regards the past depends upon the nature of the implied understanding between the public utility and

the public at the time these investments were made. It is probably correct to say that no more definite understanding could have been implied than that the service would be supplied at the cost of production. Cost of production here means the actual cost of producing the service, including interest and normal profit, but excluding monopoly gains. Whether interest and normal profit were to be based on actual cost or on cost of reproduction was probably seldom considered, and there has certainly been no authoritative statement that could justify a conclusion that either the one or the other method would prevail.

If it were generally true that public utility properties could now be reproduced at less than actual cost, the argument for the acceptance of actual cost as a normal standard for fair value would appeal very strongly to the public utility interests. As, however, prices of land, labor, and material have in general advanced enormously since 1896, most utility enterprises can only be reproduced to-day at a cost considerably in excess of the actual necessary cost. It is natural, therefore, that public utility interests should incline strongly toward the reproduction method.

It may be argued that it has, at least for a considerable number of years, been recognized by the highest courts that the company is entitled to earn a fair return on the fair value of its property. The courts have used the terms "value," "present value," "fair value," "reasonable value," and "just value" in relation to the amount upon which the fair rate of return should be based. That they have not usually had current exchange value in mind is clearly apparent from the fact that the chief weight in determining value has been given to cost, either actual cost or reproduction cost. They have usually used "value" in the sense of "normal value," as that term is understood by economists, *i. e.*, a value corresponding to the cost of production. It seems at first thought that reproduction cost corresponds more nearly to any proper use of the term "value" than does actual cost. It does have a closer relation to exchange value, but not necessarily a closer relation to normal value or cost of production, which is the only sense in which the term "value" can be properly used in this connection.

It may be argued, nevertheless, that constant use of the term "value" in this connection has, whether rightly or not, produced the impression in the minds of investors and others that utilities



would be allowed to earn upon a value represented by their reproduction cost. This argument seems particularly forceful in regard to land. It is argued that as the company owns land and could, if it so desired, dispose of it and pocket the proceeds, it amounts to confiscation not to permit it to earn on the present market value of the land. This statement needs qualification. In the first place, most land that is used for public utility purposes is improved to such an extent that if sold for other uses the loss due to the scrapping of the improvements would offset the increase of selling price over cost price. If a railroad right of way were sold for farm purposes, the loss due to the scrapping of the roadbed would more than offset any increment in the selling price of the land. In case the company desired to go out of business it could, of course, sell its entire property to any purchaser, but such purchaser would necessarily base his purchase price on probable earnings under the existing scheme of regulation. If, however, the company decided to abandon its franchise, scrap its plant; and sell its land for what it would bring for other uses, it could of course realize on the increment in the value of the land, but such increment would be far from sufficient to offset the loss in the value of the plant and equipment as based on actual cost.

But the determination of fair value is only one step in the process of determining a reasonable rate of charge. We have already found that a reasonable rate of charge for an appropriate and normally successful utility enterprise is the equivalent of the normal cost of production. The normal cost of production is the amount which in the long run it is necessary to pay to secure the utilities demanded by the public. It is the amount that will secure an equilibrium between demand and supply. Increments and profits of every kind enjoyed by the company must necessarily be considered a part of the total compensation that the company receives from the public. In so far as there are increments and profits arising from increase in land values, it is clear that such increments and profits should in a rate proceeding be considered either as income or as an offset in fixing the rate of return. Any apparent advantage secured by the company under the reproduction method is in a measure counterbalanced. The reproduction method as thus applied is therefore a roundabout method of accomplishing what can be more simply and effectively accomplished by basing the rate of

return on the actual capital cost. This does away with the necessity of accounting for appreciation or reducing the nominal rate of return.

Most of the objections to the adoption of *any* standard of value arise from a consideration of the numerous difficulties and complexities created by the case of poorly located and unsuccessful enterprises. It is apparent that in such cases rates must be fixed without much regard to cost of production. Rates in such cases must be largely based on a fair judgment of the value of the service to the consumer. In such cases the existing property has little or nothing to do with the estimate. The entire problem is approached from the standpoint of what is fair to the consumer. It is recognized that a rate which would fairly compensate the company from the standpoint of its outlay is improper, as such rate would be higher than the consumer could justly be called upon to pay. Such cases are not, properly speaking, cases for valuation at all. They are cases in which the rates must be determined largely without regard to what is normally meant by value for rate purposes. It is true that no standard of rate-making can be adopted for such cases. The usual procedure is to determine actual cost, reproduction cost, accrued depreciation, capitalization, and perhaps other factors, and then to fix an amount as fair value which at the rate of return determined upon will permit of the rate which seems to correspond to the fair value of the service. The reasoning here is somewhat circular. The fair rate of charge must be first determined and then a fair value and fair rate of return that will seem to justify the rate of charge already determined upon. In considering a normal standard of fair value for rate purposes the abnormal case of the poorly located, unsuccessful, or partially obsolete enterprise should be excluded. Such abnormal enterprises must necessarily be put in a class by themselves in considering rate and valuation problems. If the discussion is limited to the normally located and successful enterprise it is clear that a controlling standard for the determination of fair value can and should be developed. It is essential that the relations between the company and the public be put on a more permanent and dependable basis. In justice both to the company and to the public the determination of this important matter should not be left wholly to the judgment or predilection of the court in each particular case.



Most judges and individuals as well, whether consciously or not, use some standard as actually controlling. They may test their judgment of reproduction cost by actual cost, or they may test their judgment as to normal actual cost by reproduction cost, but in either event it is one or the other of these standards that is actually controlling.

The determination of a standard of value applicable to existing investments will be worked out if at all by the slow and piecemeal process of court decision in numerous cases. The final answer can only be given by the Supreme Court of the United States. It would seem, however, that as to the future, legislative bodies and commissions might at once adopt a standard. This standard would apply to future investments and to future fluctuations in existing investments. If normal actual capital cost were adopted as the rule for the future, accounting methods and rate regulation would be much simplified and the relations between the utilities and the public placed on a much more equitable and dependable basis. The adoption of this as the normal standard for appropriately located and successful enterprises would not mean that exceptional efficiency shown in the construction or operation of an enterprise could not be properly rewarded, or, on the other hand, that exceptional inefficiency could not be penalized. Such reward or penalty, however, is more properly reflected in the rate of return allowed.

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## THE CLASSIFICATION OF TRUSTS AS EXPRESS, RESULTING, AND CONSTRUCTIVE.

IN view of the provisions of the Statute of Frauds, the common classification of trusts according to their mode of creation "into express trusts, implied trusts, resulting trusts, and constructive trusts,"<sup>1</sup> and the proper definition of the terms used in that classification, are of interest and of value. An analytical examination of this particular classification of trusts leads to somewhat surprising conclusions and has its practical bearing on the applied law of trusts.

A conventional statement of the matter and a common arrangement of the terms were given by Maitland as follows:

"Trusts are created (1) by the act of a party, (2) by the operation of law. I do not think that these terms are unexceptionable, still they are well known and useful. A further classification has been made:

$$\text{Trusts} \left\{ \begin{array}{l} \text{By act of a party} \\ \text{By act of the law} \end{array} \right\} \left\{ \begin{array}{l} \text{Express.} \\ \text{Implied.} \\ \text{Resulting.} \\ \text{Constructive.} \end{array} \right. \text{" } ^2$$

Before scrutinizing closely Maitland's analysis, however, we must get some definitions of the terms, or at least must discuss details about the terms.

### A. THE NATURE OF EXPRESS TRUSTS, IMPLIED TRUSTS, RESULTING TRUSTS, AND CONSTRUCTIVE TRUSTS.

#### I.

#### *Express and Implied Trusts.*

Express trusts are, of course, trusts stated fully in language, when the language used is properly construed. There are (a) oral

<sup>1</sup> 1 Perry on Trusts, 6 ed., § 24.

<sup>2</sup> Maitland, Equity and the Forms of Action, 53.



express trusts, and (b) express trusts declared or manifested in writing.

Express trusts are usually contrasted with implied trusts.

"Implied trusts" is an ambiguous phrase. For instance, Perry on Trusts says:

"Implied trusts are trusts that the courts imply from the words of an instrument, where no express trust is declared, but such words are used that the court infers or implies that it was the purpose or intention of the parties to create a trust."<sup>3</sup>

But that definition of implied trusts seems to be only a definition of those express trusts where the express language has to be construed. A trust is genuinely express even though the express language requires interpretation, if the express language, as construed, does state it fully.

On the definition of implied trusts Perry followed Lewin,<sup>4</sup> but in a passage that is helpful Maitland fortunately has refused to do so. He said:

"I have said now what I have to say about the creation of trusts by the act of a party. Lewin and other text-writers divide trusts thus created into express and implied. It is difficult to draw the line, for since no formal words are necessary for the creation of a trust, and since whenever the trust is created by the act of the party there almost of necessity will be some words used, — even if a deaf-mute created a trust by 'talking on his fingers' there would be words used, — the distinction comes to be one between clear and less clear words, and clearness is a matter of degree. Thus Lewin, under the head of 'Implied Trusts,' treats of cases in which a testator creates a trust by such words as 'I desire,' 'I request,' 'I hope.' No firm line can be drawn — 'I desire' is nearly as strong as 'I trust,' and 'I trust that he will do this' is almost the same as 'Upon trust that he will do this.' I do not therefore think that the distinction is an important one, and very often you will find that the term 'Express Trust' is given to all trusts created by act of a party, *i. e.*, by declaration, while 'Implied Trust' stands for what Lewin calls a trust created by act of the law."<sup>5</sup>

Perry's definition of implied trusts cannot be accepted, but neither can the phrase "implied trusts" be deemed synonymous

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<sup>3</sup> 1 Perry on Trusts, 6 ed., § 25.

<sup>4</sup> 1 Lewin on Trusts, Flint's ed., 108, 130.

<sup>5</sup> Maitland, Equity and the Forms of Action, 75-76.

with "trusts created by act of the law," nor be deemed properly to embrace such trusts. To imply is to infer, and to infer is to deduce as a fact something as preëxisting. In the absence of evidence of an express trust, to infer from the conduct of the parties that a trust in fact exists is of course to imply a trust, and, as we shall see later, genuine resulting trusts are such inferred-as-a-fact or implied trusts. But where a trust is not inferred but is created, by act of the law administered by chancery, to prevent or to rectify the fraudulent enrichment of a wrongdoer, as every so-called constructive trust is, it is an imposed or fiat trust and is not an implied trust. It is only because constructive trusts are misnamed "constructive" that they have been called implied;<sup>6</sup> and now that this is apparent it is desirable to reject the customary definition of implied trusts and to limit the words "implied trusts" to trusts implied in fact, *i. e.*, to resulting trusts.

## II.

### *Resulting or Implied-in-Fact Trusts.*

In order to understand resulting trusts one must recall the law of resulting uses prior to the Statute of Uses. Before that statute there were three kinds of uses called resulting:

(1) The typical resulting use was the one held to exist where A., a fee-simple owner, made a feoffment to B. and his heirs; but B. gave no consideration, and A. declared no use in favor of B. or of any one else.

(2) Another kind of resulting use was that which existed where A. paid the purchase money for a conveyance of land by B. and

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<sup>6</sup> In the phrase "constructive trust" the word "constructive" literally means ascertained by construction; but no constructive trust is really ascertained by construction, even where the intention of the parties is considered by the court in reaching the conclusion that there is unjust enrichment. Then, too, the word "trust" literally means that trust or confidence actually was reposed by the *cestui* in the trustee (see 1 Tiffany on Real Property, § 94, p. 233); but some constructive trusts are enforced where there was never for a moment any trusting of the trustee by the *cestui*. It is doubtless too late to hope to have a more accurate term displace "constructive trusts" as a name for the equitable obligations sought to be designated, but the same reason which impelled legal writers to deny that so-called quasi-contracts are "contracts implied by law" necessitates a denial that so-called constructive trusts are trusts "implied by law."



had B. make a feoffment in fee of the land to C., who was legally a stranger to A.

(3) Closely akin to the first kind of resulting use was the use found to exist where A. made the feoffment to B. and his heirs to the use of or in trust for C. for life, or on some other use which did not purport to dispose of the whole beneficial interest, or on a use which failed for some reason to take effect, and B. gave no consideration.

In case (1) the beneficial interest in fee resulted to A., but in case (3) only the undisposed of or ineffectually given part of the fee of the use belonged to A.

In each of the above-mentioned three kinds of uses named "resulting," the reason why the court of chancery indulged a presumption of fact that the land conveyed was held on a use for the feoffor or for the payer of the purchase money, was mainly because of the lack of consideration on the part of the feoffee, though that lack of consideration was significant only because feoffments on oral trusts for the feoffor had become so common that it was fair to assume that any feoffment not paid for by the feoffee, and not expressly made to the use of the feoffee or of another, was intended to be to the use of the feoffor, or of the third person, who paid the feoffor the purchase price and thus occasioned the feoffment. The presumption of fact of a use, like every other genuine presumption of fact, was deemed rebuttable in each case, however, and, it being established that no consideration was paid by the feoffee,<sup>7</sup> the proper way to rebut it was to show that at the time of the feoffment a statement was made by the feoffor in the first and third kinds of so-called resulting uses, and a statement was made by the payer of the money in the second kind, that the feoffee should hold either to his own use or to the use of some third person. If one asks why chancery indulged the presumption of fact of a taking on a use or trust in these resulting-use cases, the answer, already foreshadowed above, is that the court of chancery took judicial notice of the vast number of feoffments on use which were being made. From the time when conveyances to uses became common down

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<sup>7</sup> Where the estate conveyed was less than the fee owned by the feoffor, and therefore involved the assumption of duties or liabilities by the one to whom it was conveyed, that assumption was regarded as consideration sufficient to make a presumption of resulting use unfair. See *Castle v. Dod*, Cro. Jac. 200.

to the Statute of Uses, it was very rational for chancery to take such notice and to indulge that presumption.

Then came the Statute of Uses. Its aim was to end the conveyance-to-uses orgy, — the old passive trust régime, — and that aim succeeded. It was not until about a century after the Statute of Uses was passed that the passive trust — the modern passive use to which the Statute of Uses does not apply — made its appearance;<sup>8</sup> and this later passive trust never was widely adopted, because the reasons which led to the vogue of the passive use had mainly ceased to exist.<sup>9</sup> Accordingly, when chancery recognized the passive trust despite the Statute of Uses, and thus gave a use on a use its proper effect, the old presumptions of fact which led to resulting uses were not properly resorted to for the purpose of recognizing and enforcing resulting trusts. Still those presumptions persisted to some extent, though to how full an extent in England is not wholly clear. Since they have persisted, it is desirable to consider the presumptions which to-day are indulged in each of the situations in which originally resulting uses were raised.

The first resulting-use situation noted above was that of a conveyance without consideration. It is commonly believed that after the Statute of Uses if A., without consideration and without declaring a use, made a feoffment to B. and his heirs, the old presumption of a resulting use to A. in fee prevailed, and the Statute of Uses converted the presumed resulting use into the legal fee and nullified the feoffment.<sup>10</sup> There is, however, a *dictum* of Lord Holt's to the contrary.<sup>11</sup> If the commonly accepted doctrine was correct there was no need for a resulting trust in such case, as A., because of the statute, still owned the realty. On that theory there could be a question of resulting trust on a conveyance without consideration made by A. to B., only if the conveyance operated under the Statute of Uses or consisted of a common-law lease and a release.

A genuine bargain-and-sale deed required a valuable considera-

<sup>8</sup> See Ames, Lectures on Legal History, 246; 21 HARV. L. REV. 261, 273.

<sup>9</sup> "Passive or simple trusts are not common in this country, and in some states it is provided by statute that the legal title shall vest in the *cestui que trust*." 1 Tiffany on Real Property, § 95, p. 236.

<sup>10</sup> 1 Tiffany on Real Property, §§ 89, 93.

<sup>11</sup> See *Shortridge v. Lamplugh*, 2 L.d. Raym. 798, 801-802.



tion, of course, namely, "money or money's worth";<sup>12</sup> so in the case of such a conveyance there was no chance for a resulting trust to be raised for want of consideration. A genuine covenant to stand seised to uses, "the consideration being blood or marriage,"<sup>13</sup> was usually in favor of a wife or child as against whom equity would indulge no presumption of trust, but in whose favor, on the contrary, it would indulge a presumption of gift or advancement; so here again there was in general no chance for a resulting trust to be presumed from want of consideration. However, by common-law lease and release, a method of conveyance not requiring livery of seisin, but requiring entry by the lessee to qualify him to get title by the deed of release, title could be passed without consideration. Then when the Statute-of-Uses method of conveyance by lease and release, which required in theory only the most insignificant consideration, and in practice no consideration, for its effectiveness,<sup>14</sup> was invented, it became perfectly possible, and quite common, to transfer real property without entry into possession by the tenant, without livery of seisin and without consideration.

But in both the common-law lease and release and the Statute-of-Uses lease and release there was a stated consideration, and in addition in the Statute-of-Uses lease there was in the judgment of the common-law courts a use raised which the statute executed,

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<sup>12</sup> Goodwin, *Real Property*, 349.

<sup>13</sup> *Id.* 351.

<sup>14</sup> "The fact that the bargain and sale for a year, which was the foundation of the conveyance by lease and release, was expressed to be made for a nominal consideration that was in fact never paid, does not form any exception to the rule that a bargain and sale must, in order to take effect as a bargain and sale, be made for valuable consideration. The lease did not operate as a conveyance until it was perfected by the release; and both stages formed together one transaction. The acknowledgment of the fictitious consideration in the lease operated as an estoppel at law, and by the release, even though it were made for no consideration, the assurance became complete at law, without any need to resort to the equitable doctrine of bargains and sales. This assurance is therefore no exception to the rule, because it did not take effect by the means contemplated by the rule. If the validity of the use declared by the lease could have been raised in equity, as a substantive question, upon general principles it would have been permissible in equity to adduce evidence of the fictitious character of the consideration, and this might in equity have been fatal to the validity of the use. But the whole transaction was complete at law, where the doctrine of estoppel precluded all evidence touching the consideration; and when it had been completed at law, there existed no equity (except under special circumstances such as fraud, which are not in contemplation) to disturb the transaction." Challis's *Real Property*, 3 ed., 420.

and the right of chancery to presume a resulting trust in either case was not even urged for a long time. As late as 1740 Lord Hardwicke stated in substance in *Lloyd v. Spillet*<sup>15</sup> that the Statute of Uses and the Statute of Frauds left room for only two kinds of resulting trusts, and the kinds he named did not include the kind where a grantee without consideration, or on a nominal consideration, is presumed to hold for the grantor. The soundness of Lord Hardwicke's view of the English law is doubtful, as is shown by the fact that Lewin<sup>16</sup> and Maitland<sup>17</sup> regard a presumption of a resulting trust for the grantor where no consideration is paid, as still entertained in England. Whatever the rule in England may be, in this country there certainly is no such presumption of a resulting trust where the deed of conveyance either recites a consideration or states that the grantee is to hold to his own use; and of course only a freak conveyance could fail to do one of those two things.

Perhaps the most convincing way of putting the refusal of American courts to presume and enforce a resulting trust in favor of the grantor just because for no actual consideration he conveys by a deed which recites a consideration, or declares that the grantee is to hold to his own use, is found in the statement of Cope, J., in *Russ v. Mebius*,<sup>18</sup> that "The doctrine of resulting uses and trusts is founded upon a mere implication of fact made by law, and in general this implication cannot be indulged in favor of the grantor where it is inconsistent with the presumptions arising from the deed." The reason, however, why we find the presumptions or inferences of fact from the deed, is, of course, that to-day instead of the vast majority of titles to realty being held on secret oral trusts, only a very limited minority can be said to be held in that way. The real justification for the refusal to presume a resulting

<sup>15</sup> 2 Atk. 148, Barn. 384.

<sup>16</sup> Lewin on Trusts, Flint's ed., 144; id., 12 Eng. ed., 164.

<sup>17</sup> "For no valuable consideration I convey land unto and to the use of A. and his heirs. Here the use does not result, for a use has been declared in A.'s favor, so A. gets the legal estate; but in analogy to the law of resulting uses the court of chancery has raised up a doctrine of resulting trusts. If without value by act *inter vivos* I pass the legal estate or legal rights to A. and declare no trust, the general presumption is that I do not intend to benefit A. and that A. is to be a trustee for me. However, this is only a presumption in the proper sense of that term and it may be rebutted by evidence of my intention." Maitland, *Equity and the Forms of Action*, 79.

<sup>18</sup> 16 Cal. 350, 357 (1860).



trust in favor of a grantor who conveys without consideration is that such a presumption would in the ordinary case be in opposition to the real intentions of the parties, and that chancery takes judicial notice of that fact.

While in this country we do not, in general, presume a trust for the grantor in the case of voluntary conveyances, we have no hesitancy in either presuming a resulting trust for the grantor, or by construction finding the express trust to give the equitable interest to him, in those cases in which the voluntary grantee takes the legal title to his own use but expressly "in trust nevertheless," and the trusts declared fail in whole or in part, and in which no rule of public policy nor countervailing presumption prevents the grantor from taking the equitable interest,<sup>19</sup> or in presuming a resulting trust where A. pays B. the purchase money for realty which B., at A.'s request, conveys to C. and his heirs "to the use of C. and his heirs."<sup>20</sup> A declared use to the grantee and a stated consideration inserted in the deed to C. not preventing the construction of a trust or the presumption of a resulting trust in such cases,<sup>21</sup> it is easy to see that in any case where without an actual consideration, but with a stated consideration, a conveyance is made by a grantor to a grantee who, by the terms of the deed, is to hold to the grantee's own use, a resulting trust might possibly be presumed. The statement in the deed that the grantee is to hold *to his own use* might easily be deemed to fulfil its whole function in preventing the presumption of a resulting *use*, to which the Statute of Uses could apply, and hence to interfere in no way with the presumption of a resulting *use on a use*, *i. e.*, a resulting *trust*; and the only reason why this is not the American method of dealing with the deed is that we believe that to imply such a resulting trust would in nine

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<sup>19</sup> If the conveyance was on a full payment for the land made by a third person, a resulting trust should be found for him rather than a trust for the grantor. *Heiskell v. Trout*, 31 W. Va. 810, 8 S. E. 557 (1888); *In re Davis*, 112 Fed. 129 (1901).

<sup>20</sup> See *Stratton v. Dialogue*, 16 N. J. Eq. 70 (1863); *Cotton v. Wood*, 25 Ia. 43 (1868). In *Stratton v. Dialogue*, *supra*, Green, Ch., said: "The material question in the case is, whether the land was in fact paid for with the funds of the company. If it was, there is clearly a resulting trust in favor of the company, although the deed is made absolute to Dialogue, and purports upon its face to be for his own use and benefit." 16 N. J. Eq. 70, 71.

<sup>21</sup> The leading American case on the stated consideration point is *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582 (1815). For other cases see 39 Cyc. 158, note 49.

times out of ten defeat the actual but accidentally unprovable intention of the parties.

But while in the United States there is properly a presumption against a resulting trust for the grantor on a conveyance for a stated consideration or on a declared use, the general American doctrine that there is a conclusive presumption against an implied trust of any kind in such a case is indefensible. It is often said in justification of the American doctrine just stated that, "in conveyances that are in form deeds of bargain and sale, parol evidence cannot be received to control or contradict the statement of the consideration,"<sup>22</sup> and that the recitation in any deed that the grantee is to hold to his own use conclusively rebuts the presumption of a resulting trust, "as it is a rule that when a use is declared no other use can be shown to result";<sup>23</sup> but neither statement is a justification. In all jurisdictions equity does go behind the recitations of consideration and of use in a deed in order to enforce a constructive trust against a voluntary grantee who agreed orally to hold in trust for the grantor, and now refuses to perform and relies on the parol-evidence rule and on the Statute of Frauds, provided that the oral promise of the voluntary grantee was made with the actual secret intent on his part not to perform, or the deed was obtained by undue influence, or there was a special confidential relationship which equity will not permit to be violated through the breach of the oral promise; and since equity can go behind those recitations in some cases, it can go behind either or both of them in any case where it is desirable to do so, for equity need never regard mere form. The statement that the declared *use* necessarily prevents a presumption of resulting *trust* is unsound. The declared *use* prevents a presumption of a resulting *use*, of course, and therefore, because of the stated use, the Statute of Uses cannot revest the legal title in the grantor; but while the legal title must remain in the grantee, a resulting *trust* might be presumed if it seemed fair; and even though a resulting trust should not be presumed, a constructive trust might well be enforced where an express oral agreement to hold in trust and an unjust enrichment in breach of it are shown. To indulge a presumption of fact against a trust under such a deed is one thing, but to refuse to let that presumption or

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<sup>22</sup> 1 Perry on Trusts, 6 ed., § 162, p. 254.

<sup>23</sup> Id. p. 255.



any other be rebutted where a trust was actually intended and undertaken and, in consequence, to allow unjust enrichment, is quite a different thing. Whether such refusal to permit the presumption to be rebutted is based on the parol-evidence rule or on the Statute of Frauds, it is historically and logically unsound.<sup>24</sup>

So much for the first kind of resulting trust urged on the analogy of the first kind of resulting use.

The second kind of resulting use — that presumed because one man paid the purchase money and the deed was taken to another who was not so related to the payer that the presumption seemed unfair — was made by chancery the model for a similar presumed resulting trust, and, accordingly, a rebuttable presumption of a trust for such a payer is indulged, wherever by statute the rule has not been changed.<sup>25</sup>

The third kind of resulting use mentioned above was the prototype for a similar kind of trust customarily called a resulting trust.

Pomeroy splits that kind of trust — called by him a resulting trust — into two subdivisions; but that seems unnecessary. Under the general head of “trust resulting to the donor” Pomeroy has three subdivisions, the third being the case of conveyances without consideration already discussed, and the other two being stated as follows:

“1. Where property is conveyed by will or deed upon some particular trust or particular objects, and these purposes fail in whole or in part, or the particular trusts are so uncertain and indefinite that they cannot be carried into effect, or they lapse, or they are illegal, — in all of these cases a trust, either with reference to the whole property or to the residuum, results in favor of the grantor, or the heirs, residuary devisees or legatees, or personal representatives of the testator. . . .

“2. . . . A second subdivision includes those cases where the owner of both the legal and the equitable estates conveys the legal estate, but does not convey the equitable estate, or conveys only a portion of it, and a trust in the entire equitable estate in the one instance, or in the

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<sup>24</sup> For a refutation of the parol-evidence rule argument, see the concurring opinion of Connor, J., in *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028 (1909). A refutation of the Statute-of-Frauds argument is attempted later in this article.

<sup>25</sup> The justifiableness of that presumption in our time has well been doubted. Ames, *Lectures on Legal History*, 431, 434; 20 *HARV. L. REV.* 549, 555-557. It is there pointed out, however, that a statutory or other conclusive presumption against a trust is even more unjustifiable.

part of it undisposed of in the other, will, in general, result to the grantor, or to the heirs or representatives of the testator." <sup>26</sup>

Most of Pomeroy's second subdivision has practically been eliminated in the United States by the rule of construction which cuts down the legal estate expressed for a trustee to one no greater than he needs for the proper execution of the trust, and which therefore gives a grantor, or the heir or residuary devisee of a testator, a legal interest where once he would have had a resulting equitable interest. In the United States this rule of construction applies to deeds of trust as well as to devises in trust; <sup>27</sup> but in England, though the rule applies to wills, it seems not to apply to deeds, because "there the construction adheres more strictly to the letter." <sup>28</sup>

The two subdivisions mentioned in the passage quoted from Pomeroy are essentially one, for in both the court of chancery concludes that the grantee is not to keep any undisposed-of beneficial interest despite a stated consideration in the deed and despite an *habendum* to the use of the grantee. The words "in trust nevertheless" following the *habendum* clause are sufficient to show that if the trust for any reason fails to take effect, the voluntary grantee is not to keep for himself.

Before the statute of uses, then, there were three kinds of resulting uses, namely: (1) Where by feoffment, fine, or recovery, the full legal title which the grantor had was transferred without consideration and without the declaration of a use, there was a resulting use to the grantor; (2) where by feoffment, fine, or recovery, or common-law lease and release, made for consideration paid by one person, the legal title was conveyed to another who was a legal stranger to the payer, there was a resulting use to the payer of the consideration unless the payer did something to negative it; (3) where by feoffment, fine, or recovery, without consideration, or by common-law lease and release, without consideration, a use was declared which did not exhaust the equitable interest which would have resulted if no use had been declared, there was a resulting use to the grantor to the extent that the use declared did not exhaust that interest.

<sup>26</sup> 3 Pomeroy, Equity Jurisdiction, 3 ed., §§ 1032, 1034.

<sup>27</sup> 1 Perry on Trusts, 6 ed., § 319.

<sup>28</sup> Lewin on Trusts, 12 Eng. ed., 241. See also 1 Perry on Trusts, 6 ed., § 319.



Since the Statute of Uses, the first kind of resulting use has commonly been supposed to continue, and though that may be doubted,<sup>29</sup> the fact that feoffments, fines, and recoveries have long been obsolete makes the question wholly a moot one. But after chancery saw the fraud permitted by the Statute of Uses and stopped it by recognizing and enforcing passive trusts — uses on uses — and after it became possible, by so-called bargain-and-sale leases and releases, operating under the Statute of Uses, to convey a fee without consideration, and without entry under a lease or livery of seisin, the question whether a resulting trust corresponding to the first kind of resulting use mentioned above should not be presumed on a conveyance without consideration by a common-law lease and release or by a bargain-and-sale lease and release, became a practical one. As we have seen, some prominent English writers believe that there is in England such a resulting trust corresponding to the first kind of resulting use, but in the United States the notion that such a trust should be presumed is not entertained. But in both England and the United States trusts corresponding to the second and third classes of resulting uses above mentioned, and in both instances commonly called resulting trusts, have been and are to-day presumed and exist. We shall have occasion, however, to question the correctness of the name “resulting trust” as applied to the third class of trusts.

### III.

#### *Constructive Trusts.*

Constructive trusts are not easy to define. They comprise all trusts recognized and enforced by chancery that are neither express trusts nor resulting trusts. Express trusts and resulting trusts are trusts by the real or the presumed intention of the parties,<sup>30</sup> but constructive trusts are trusts *in invitum*. A con-

<sup>29</sup> See note 11, *ante*.

<sup>30</sup> With reference to resulting trusts as intention trusts, an interesting question may arise. Whose intention, for instance, is presumed or must be presumed? Suppose, for example, that A. pays the purchase price for land bought from B. and the conveyance is made to C., a legal stranger to A., but without any knowledge on B.'s part that A. has anything to do with the sale. It would, of course, be held that a resulting trust exists in the absence of affirmative proof of a gift as intended by A. to C., and the

structive trustee may, indeed, have started out as an express or resulting intention trustee, and then have repudiated the trust in reliance on the Statute of Frauds or the Statute of Wills or some other statute, or in reliance on the parol-evidence rule; but in such case it was not until he repudiated the express trust that he did or could become a constructive trustee. *Qua* constructive trustee — as where his repudiation with retention of the trust *res* constitutes a gross violation of a special confidential relation — he is from the start a resisting and not a consenting or intention trustee.

Constructive trusts are preëminently trusts which in current court language are called "implied by law." "Implied by law" is, however, an erroneous designation, because "implied" means "inferred," and a constructive trust is not "inferred," but instead is created for the first time and imposed on the trustee because of his fraud. In a sense resulting trusts are implied by law, because it is the court that indulges the presumption of fact;<sup>31</sup> but since

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necessary consequence of such a holding would be that B.'s intentions are immaterial. But is that consistent with the rule as to express trusts? One supposititious case will demonstrate that it is. If A. and C. agree in writing that C. shall obtain from B. a deed to land that B. has to sell, that A. through C. shall pay the purchase price, and that C. shall hold the title so acquired in trust for A., and if B. makes the conveyance without any knowledge that A. is interested, the trust by which C. is bound is clearly an express intention trust. Since in the case of an express trust of the kind supposed the only parties who must have trust intentions are the payer of the purchase money and the one who takes the title to the property bought, it would seem clear that the only intention that need be presumed in the case of a resulting trust of the same kind to make it an intention trust is the intention of those same parties. If the vendor of the property knew of the relations between his grantee and the payer of the purchase money and purported to express the trust in his deed, that fact might raise some question as to the proper writing to look to as proof of the terms of the express trust, but it would not make the trust any more an intention trust. The same thing is true of the knowledge of the vendor in the third-person-payer resulting trust case, and in consequence the vendor's knowledge that his grantee is not paying for the property himself need not be presumed.

<sup>31</sup> That is the sense which justifies the view that they come under section eight of the Statute of Frauds instead of under section seven. In writing of the history of *assumpsit* Dean Ames said: "The lawyer of to-day, familiar with the ethical character of the law as now administered, can hardly fail to be startled when he discovers how slowly the conception of a promise implied in fact, as the equivalent of an express promise, made its way in our law." Ames, *Lectures on Legal History*, 154. See same passage in 2 *HARV. L. REV.* 53, 58. While chancery got the conception earlier than the law courts did, as Dean Ames also pointed out (Ames, *Lectures on Legal History*, 154; 2 *HARV. L. REV.* 53, 60), and the resulting-use doctrine was one of the consequences of chancery's acceptance of implications of fact, the chancery judges have been behind the law judges in discriminating between implications of fact and so-called "im-



the presumption of a resulting trust is in essence one of fact, such a trust is presumed as an actually intended trust and so is fundamentally not implied by law. A resulting trust, properly so called, is a law-inferred-as-a-fact trust; a constructive trust is a law-imposed trust.

With reference to constructive trusts the important question is, What are the essential ingredients of such a trust? It is common to speak of a constructive trustee as an *ex delicto* or *ex maleficio* trustee, and it is said that a man must be guilty of fraud before he can be deemed a constructive trustee. It is no doubt too late to quarrel seriously with that way of stating the matter, but though it is necessary to accept that language, the acceptance must be with explanations and conditions. The first condition is that regardless of whether the subdivision of fraud into (1) actual fraud and (2) constructive fraud is in general to be commended, — no doubt it is not to be approved,<sup>32</sup> — the admission that a construc-

tions of law." While the general distinction between contracts implied in fact and quasi-contracts is being emphasized by law judges to-day, the fact that a resulting trust is implied in fact and that a constructive trust is an equitable quasi-contract is being overlooked. It is being assumed to-day, just as it was assumed by the authors of the Statute of Frauds, that a resulting trust is implied by law just because the law announces that a rebuttable presumption of intention is applicable on proof of certain facts. That assumption is wrong, but section eight of the Statute of Frauds was framed by those who believed it to be the right assumption, and, in consequence, resulting trusts have properly been deemed trusts which "arise or result by the implications of law" within the meaning of those words in that section. While resulting trusts properly fall under that section, the wording of that section should not prevent a realization that resulting trusts are after all implied in fact and not implied by law, and that no trusts are properly to be called "implied by law."

<sup>32</sup> "It must be remembered that for a long time equity judges and text-writers thought it necessary or prudent for the support of a beneficial jurisdiction to employ the term 'fraud' as *nomen generalissimum*. 'Constructive fraud' was made to include almost every class of cases in which any transaction is disallowed, not only on grounds of fair dealing between the parties, but on grounds of public policy. This lax and ambiguous usage of the word was confusing in the books and not free from confusion in practice. Plaintiffs were too apt to make unfounded charges of fraud in fact, while a defendant who could and did indignantly repel such charges might sometimes divert attention from the real measure of his duties. Cases in which there was actual fraud or culpable recklessness of truth were not sufficiently distinguished from cases in which there was only a failure to fulfil a special duty. But it seems needless at this day to pursue an obsolete verbal controversy." Pollock, *Contracts*, 8 ed., 556. Unfortunately the controversy is not obsolete in the United States, even if it is in England; and with us it is still advisable to resort at times to the phrase "constructive fraud" to keep a defendant who indignantly denies actual fraud from diverting "attention from the real measure of his duties."

tive trust is a fraud trust can be made on no other terms than the retention of both actual fraud and what has been called "constructive fraud" as fraud. One illustration will make this clear. A., the express trustee of a secret trust, makes a deed of gift to B. of forty acres of the trust *res*. The deed recites a consideration and states that B. is to hold to his own use. B. takes innocently, but later C., the *cestui que trust*, learns of the transaction and demands that B. deed back the property, and A., the guilty trustee, unites in the demand. B. refuses to deed back the property. Here B. is not an express trustee, and he is not a resulting trustee. Is he a constructive trustee? If actual fraud were necessary to make him a trustee, most jurisdictions would have to say that he is not one; for in most jurisdictions actual fraud would not be deemed to exist unless B. acquired the property by resort to artifice, trick, or design, or with knowledge that the trustee was giving him trust property. But, in the case supposed, actual fraud, so defined, did not exist and, what is more, is not deemed essential in any jurisdiction to the enforcement of a constructive trust in such a case. B.'s insistence on retaining his legal advantage for which he gave no consideration, after learning that A. conveyed in breach of trust, is just as bad as a fraudulent acquisition would have been, and is so called "constructive fraud" which equity makes the basis of a constructive trust. While the courts frequently forget the fact in the Statute-of-Frauds cases, fraudulent retention, *i. e.*, retention of the property with "constructive fraud," after innocent acquisition, is just as satisfactory a basis for a constructive trust as is fraudulent retention after fraudulent acquisition. Both ought to be recognized as actual fraud — fraud at the end is as much fraud as is fraud at the start — but whether fraudulent retention is called actual fraud or constructive fraud, it is sufficient justification for raising a constructive trust.

The defendant's intent to retain the property existing at the time when he refuses to give it up and when it is a violation of good faith or of common honesty for him to retain it, is, then, the only fraudulent intent which equity needs to justify it in declaring a constructive trust to exist and in awarding a remedy.<sup>33</sup>

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<sup>33</sup> Some of the Statute-of-Wills cases make this clear. See, for instance, *Powell v. Yearance*, 73 N. J. Eq. 117 (1907); *Winder v. Scholey*, 83 Ohio St. 204, 216, 93 N. E. 1098 (1910).



## B. CLASSIFICATION.

Now that we have some acquaintance with our terms, the real questions of classification can be confronted, and at the start it seems desirable to emphasize the often-forgotten fact that the fundamental reason for enforcing an express trust is the same as that for enforcing a resulting trust and is the same as that for enforcing a constructive trust. In classifying it is usually more important to emphasize differences than similarities, but now that we have marked off resulting trusts as implied in fact and constructive trusts as imposed by law, and have distinguished both, therefore, from express trusts, it would seem to be of very considerable practical importance to show their really close relation. To do so, it is only necessary to answer the question, Why does equity recognize and enforce a resulting trust? Where A. pays the purchase money for land owned by B. in fee, and B. at A.'s request conveys to C. in fee, we say that there is a resulting trust, because C. is presumed to have agreed, *i. e.*, has by conduct agreed, to hold in trust. It is a promise by act, as distinguished from an express oral or written promise, but nevertheless is an actual promise. But why should chancery make C. perform that implied-in-fact promise or make the trustee of an express trust perform his express promise? The question is not whether in the resulting trust case supposed the Statute of Frauds should be a defense to C., for clearly that statute was not intended to interfere with resulting trusts; but the question is whether equity has any good reason to give for enforcing at all a resulting trust or an express trust. The answer of chancery judges to that question, and their only possible answer, is that it is against conscience to permit C. to enrich himself at A.'s expense contrary to the ascertained intention of the parties, by repudiating his implied-in-fact promise or his express promise and keeping the property. But unjust enrichment is just as much the basis of a constructive trust as of a resulting trust or of an express trust, even though the constructive *cestui* should be deemed to have a quasi-contractual claim against the constructive trustee; for chancery does not regard the money judgment that would be rendered on that quasi-contractual claim as an adequate remedy, and offers its own adequate remedy to prevent the unjust enrichment. A resulting trust, unlike a constructive trust, is an intention trust, but an intention trust, whether an express or an

implied-in-fact trust, is enforced for the very same fundamental reason that a constructive trust is, namely, to prevent the unjust enrichment of the fraudulent retainer of the property. We are too apt to forget that the sole reason why chancery took jurisdiction to enforce uses, the earliest trusts, was to prevent the unjust enrichment by feoffees through their fraudulent retention of land conveyed to them in use or confidence, and that to-day there is no other reason for chancery's enforcement of any kind of a trust.<sup>34</sup>

In the case of express trusts the trust will everywhere be enforced regardless of whether the fraud consists of fraudulent acquisition and fraudulent retention combined or only of fraudulent retention. In the case of resulting trusts the same thing is true. But some courts hesitate to raise constructive trusts in the Statute-of-Frauds cases on fraudulent retention alone, though it is fraudulent retention and not fraudulent acquisition that injures the defrauded party and enriches the fraudulent party, and though the same courts in effect recognize the truth of that statement whenever they enforce a resulting trust in favor of the payer of the purchase money against a grantee who took innocently but afterwards decided to retain the trust *res* for himself through the aid of the parol-evidence rule or of the Statute of Frauds or of both. However inconsistent in granting and in withholding relief in the trusts cases some courts may be, the proper principle for their guidance is clear the moment the essential reason for the recognition and enforcement of trusts — the rectification of unjust enrichment — is seen to be the same for all trusts, whether they are express or implied, and whether, if not express, they are resulting or constructive.

With this explanation, we may now proceed to consider the classification problems in more detail.

## I.

### *Express Trusts.*

Express trusts heretofore have needed practically no subdivision. By reason, however, of the somewhat old use in the books of the word "implied" to describe what are really, in a fair sense, only express trusts, it will be well to divide express trusts into (1) Ex-

<sup>34</sup> This is common historical knowledge. See Ames, Lectures on Legal History, 237-238; 21 HARV. L. REV. 265.



press trusts manifest without interpretation, and (2) Express trusts ascertained, clarified, and defined by construction.<sup>35</sup>

The first class of express trusts needs no elaboration, but the second class of express trusts requires further subdivision.

One subdivision of that second class of express trusts will consist of precatory trusts, *i. e.*, trusts "created by certain words, which are more like words of entreaty and permission than of command or certainty."<sup>36</sup>

Another subdivision, it seems, will be comprised of one of the trusts commonly regarded as resulting, namely, the kind of trust which Pomeroy splits into two subdivisions, as noted on p. 446, *ante*. Where property is conveyed by deed without consideration, or is disposed of by will, in trust, but the trusts specified fail in whole or in part, it is customary to say that there is a resulting trust to the grantor or to those who have succeeded either to his rights or to those of the testator. Is this a real resulting trust, *i. e.*, a genuine implied-in-fact trust, or is it something else? While at first sight the idea seems strange, it is probable that it is an express trust ascertained by construction. The current assumption that the trust is resulting is made in forgetfulness of the fact that construction involves inferences of fact. The question, then, is whether in the case of this kind of a trust inferences of fact have to be used to an extent not reasonably to be regarded as justifiable in cases of mere interpretation. In the trust supposed, the clearly express trust is the trust which fails. Then the question is whether the trust which is enforced for the grantor or his heir, or for the residuary devisee or the heir of the testator, is also express or is implied in fact. It seems to be a case of what may be called indirect or negative construction, *i. e.*, construction by elimination. Knowing

<sup>35</sup> The word "construction" is here meant to include both the ascertainment of the actual intention of the creator of the trust, as revealed in the express words of the trust, and the adoption of what the court believes from the revealed actual intention would have been the intention of the creator of the trust if the situation calling for definition of the trustee's powers and duties under the express trust, or for a determination of the equitable interests which the trust gives rise to, had presented itself to his mind. Compare Gray's *Nature and Sources of the Law*, § 370 (interpretation of statutes), and §§ 702-705 (interpretation of wills). Although some day it may be well to discriminate in terminology these two very different exercises of the judicial function, necessity has not yet forced that discrimination on us in the law of trusts.

<sup>36</sup> Black's *Law Dictionary*, 928. That precatory trusts are express trusts ascertained by construction is clear. See 1 Pomeroy, *Equity Jurisprudence*, 3 ed., p. 178, n.

the interest which the grantor or the testator had, the court construes the conveyance or will and finds that all not effectually conveyed remained at law in the grantor, or by analogy vested in the grantor in equity, immediately upon the conveyance, and that all not effectually devised to the *cestuis* vested in the testator's heir or in the residuary devisee. The direct or positive construction consists in ascertaining the property interest of the express *cestuis*; but as the property interest of the grantor, or of the successor in interest of the testator, is figured out by deducting the property interests of the express *cestuis*, ascertained by positive construction, from the total property interests to be disposed of, that deduction would seem to be still part of the construction of the express trust, even though it is only a by-product part. To be sure, a presumption that there is no trust for the grantor is raised by the stated consideration or by the use *habendum* in the deed or by both; and a presumption that there is no trust for the testator's successor in interest is raised because the testator, anticipating death, does not expressly provide for the successor in interest, but in each case that presumption is overcome by the "in-trust-nevertheless" clause in the deed and the "in-trust" clause in the will. Where the voluntary deed or devise is expressly "in trust" and the trusts fail, the "in-trust" clause keeps the deed or will from carrying a conclusive or other presumption of gift. The words "in trust" are words which raise a presumption that a gift to *cestuis* and not to the grantee was intended, and which therefore make rational the presumption of fact that the portions of the equitable interest which are unclaimable by the intended *cestuis* were intended to belong to, and so are unreflectingly but plausibly said "to result to," the creator of the trust or his successors in interest. Those presumptions are interpretation presumptions, it would appear. Surprising as it may be, this kind of a trust seems, then, fairly to be classified as express by construction.

## II.

### *Resulting Trusts.*

As we include under express trusts those trusts defined by construction which many writers have called implied,<sup>37</sup> the term

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<sup>37</sup> A vendor against whom a bill for specific performance will lie is often spoken of as a trustee, and in *Felch v. Hooper*, 119 Mass. 52 (1875), it was deemed by the court



"implied" can be utilized to cover, as already noted, resulting trusts. True resulting trusts are implied in fact, and they are the only implied trusts properly so called.

Implied-in-fact trusts give us our first serious classification problem. The typical resulting trust is implied in fact, but some so-called resulting trusts can be regarded as implied in fact only by a resort to a very artificial reasoning.

Take the case where A. pays B. the purchase price for property and has B. convey it to A.'s wife, C., who receives it on an oral trust for A. From the fact that C. is A.'s wife there is a presumption of a gift to her by A., but as this presumption is rebuttable the oral trust may be proved to rebut it. The presumption of gift having been rebutted, equity makes C. hold as trustee for A. despite C.'s plea of the Statute of Frauds and despite the fact that C. may have taken with innocent intent and have decided to keep for herself only after quarrels between her and her husband took place or some other occurrence influenced her.<sup>38</sup> So chancery will make

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that the land contracted to be sold was "charged with an implied trust" within the meaning of a statute which gave the court power, on service by publication, to decree a conveyance by a non-resident person "seised of an estate upon a trust express or implied," and to appoint some suitable person to make the conveyance. This case was one where on a bond for conveyance given by the vendor the vendee had paid part of the purchase money, entered into possession of the land, made improvements thereon, and tendered the balance of the purchase price, and the court seemed to think that because the part payment and the tender of the balance of the purchase price had to be shown *dehors* the bond the trust was implied and not express. Colt, J., said for the court:

"This statute expressly includes implied trusts and cannot be confined in its application to trusts which are created by deed or will and do not depend upon the proof of facts which may be open to dispute."

It is believed, however, that the trust, if it really was a trust within the meaning of the statute, was an express trust found to be such by construction, and that by "a trust . . . implied" was probably meant a resulting trust and a constructive trust only. The bond for title was certainly an express contract and if equity says that the vendor was a trustee because of his contract obligations, he was of course an express trustee. This is none the less true although he would have been astonished to be told that he was an express trustee. That he was seised of an estate upon express trust within the meaning of the words in that Massachusetts statute, if he was a trustee at all within the intent of that statute, seems reasonably clear. On whether he was a trustee, see *Merrill v. Beckwith*, 163 Mass. 503, 40 N. E. 855 (1895).

<sup>38</sup> *Smithsonian Institution v. Meech*, 169 U. S. 398, 18 Sup. Ct. 396 (1897); *Duval v. Duval*, 54 N. J. Eq. 581, 35 Atl. 750 (1896); *Short v. Short*, 62 Ore. 118, 123 Pac. 388 (1912). See *Harden v. Darwin*, 66 Ala. 55 (oral trust performed) (1880); *Carpenter v. Gibson*, 104 Ark. 32, 148 S. W. 508 (oral trust not proven) (1912). But see *Kinley v. Kinley*, 37 Colo. 35, 86 Pac. 105 (1906); *Murray v. Murray*, 153 Ind. 14, 53 N. E.

C.'s heirs or devisees hold in trust for A. despite their plea of the Statute of Frauds, and despite the fact that C. never had a fraudulent intent but always acknowledged orally the existence and binding nature of the trust.<sup>39</sup>

Why does chancery do this? Were the history of the implied-in-fact and the so-called "implied-in-law" trusts to be forgotten, it would seem as if there could be but one logical answer, namely, that when the presumption of a gift was rebutted by showing that a gift was not intended and a trust was, all presumptions of fact were at an end, and the situation was then one of an oral trust of land, a repudiation of that trust by the trustee, and an attempted unjust enrichment of the trustee by the retention for his own use of the trust *res* at the expense of the buyer of the property. In other words, on principle, the trust, and, in the absence of a controlling historical development to the contrary, the only trust for chancery to declare and enforce would seem to be a constructive trust.

But the historical development of the trust doctrine has been against that analysis. If, as just suggested, this kind of a trust is different from the ordinary resulting trust, most of the courts have not been aware of it. The typical resulting trust has been where A. has paid for property and B. has conveyed it at A.'s request to C., who was not related to A. There chancery indulged the presumption of fact — rebuttable, as such presumptions normally are — that C. was to hold in trust for A. But if C. was A.'s wife a presumption of gift was indulged. Without noticing that this presumption of gift was on principle the only presumption where C. was A.'s wife, the chancery judges regarded the presumption of a trust as the first one entertained and as rebutted by proof of the relationship of the parties, with the consequent presumption of fact of a gift. Then when that presumption of fact of a gift

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946 (1899); *Andrew v. Andrew*, 114 Ia. 524, 87 N. W. 494 (1901); *Mullong v. Schneider*, 155 Ia. 12, 134 N. W. 957 (1912). Compare *Johnson v. Ludwick*, 58 W. Va. 464, 52 S. E. 489 (1906); *Ludwick v. Johnson*, 67 W. Va. 499 (1910).

<sup>39</sup> *Sherman v. Sherman*, 20 D. C. 330 (1892); *Bachseits v. Leichtweis*, 256 Ill. 357, 100 N. E. 197 (1912); *Cotton v. Wood*, 25 Ia. 43 (1868); *Price v. Kane*, 112 Mo. 412, 20 S. W. 609 (1892); *Bartlett v. Bartlett*, 15 Neb. 593, 19 N. W. 691 (1884); *Bailey v. Dobbins*, 67 Neb. 548, 93 N. W. 687 (1903); *Lahey v. Broderick*, 72 N. H. 180, 55 Atl. 354 (1903); *Yetman v. Hedgeman*, N. J. Eq. (1913), 88 Atl. 206; *Hickson v. Culbert*, 19 So. Dak. 207, 102 N. W. 774 (1905); *Bickford v. Bickford's Estate*, 68 Vt. 525, 35 Atl. 471 (1896). See *Corr's Appeal*, 62 Conn. 403, 26 Atl. 478 (1892). Compare *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.) 537 (1817). But see *Chapman v. Chapman*, 114 Mich. 144 (1897); *Ryan v. Williams*, 92 Minn. 506 (1904).



was itself rebutted, by evidence of an express oral trust undertaken by C. as trustee for A. as *cestui*, the equity courts regarded the original presumption of fact of a trust as remaining in undisputed control of the field.<sup>40</sup>

The artificiality of indulging the *presumption of fact of a trust* when presumptions of fact are unnecessary because of *actual proof of an express trust* is apparent. Where the presumption of a gift, indulged because C. is A.'s wife, is rebutted by circumstances raising a fair inference that a gift was not intended — as where A. pays for the property with the only money or other property that he owns and therefore will be left penniless if a gift is presumed<sup>41</sup> — it is of course fair to say that the original presumption of a trust is still there to carry the day in favor of the resulting-trust view of the transaction; but it certainly seems wrong on principle to say that any inference of a trust, *i. e.*, any presumption of a trust, can have any vitality after *inference* of a trust has given way to *demonstration* of an express trust. The trust which is enforced where the presumption of a gift by the buyer of property to his wife or child, to whom it is conveyed at his request, is overcome by proof of an express oral trust for him, and in breach of which the property is withheld, should be recognized as a constructive trust. The same is true, it would seem, where the buyer has the property conveyed to a legal stranger who orally agrees to hold for the buyer. The oral agreement ought not to prevent the enforcement of a trust, but the trust is logically not resulting but constructive.<sup>42</sup> If A. pays B. and the conveyance is made to C.,

<sup>40</sup> See *Smithsonian Institution v. Meech*, 169 U. S. 398, 411, 18 Sup. Ct. 396 (1897).

<sup>41</sup> See *Skahen v. Irving*, 206 Ill. 597, 69 N. E. 510 (1903).

<sup>42</sup> These statements are made with some reluctance, because in some jurisdictions correct decisions rendered in cases where the courts thought they had before them resulting trusts would probably be overruled, under the influence of the doctrine of *stare decisis*, if the courts were convinced that the so-called resulting trusts were really constructive. Unfortunately this probably would be the result in Illinois, in which state, for a constructive trust to arise where property is conveyed on an oral trust for either the grantor or for third persons, the court has pretty consistently required either an actual fraudulent intent on the part of the grantee, or undue influence by him exerted on the grantor, at the time of the conveyance (see the trust for grantor cases: *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379 (1885); *Lawson v. Lawson*, 117 Ill. 98, 7 N. E. 84 (1886); *Biggins v. Biggins*, 133 Ill. 211, 24 N. E. 516 (1890); *Champlin v. Champlin*, 136 Ill. 309, 26 N. E. 526 (1891); *White v. Ross*, 160 Ill. 56, 43 N. E. 336 (1895); *Mayfield v. Forsyth*, 164 Ill. 32, 45 N. E. 403 (1896); *Williams v. Williams*, 180 Ill. 361, 54 N. E. 229 (1899); *Benson v. Dempster*, 183 Ill. 297, 55 N. E. 651 (1899); *Skahen v. Irving*, 206 Ill. 597, 69 N. E. 510 (1903); *Lancaster v. Springer*, 239 Ill. 472,

who is no relative of A.'s but who expressly though orally promises to hold in trust for A., there is no more room for the indulgence of a presumption of a trust than there would be if the express trust were manifested in writing; and wherever the constructive-trust doctrine is properly apprehended there is no more need for the indulgence of that presumption.

As this is an article regarding proper classification, principle can be accorded first place, and accordingly some trusts heretofore regarded as resulting will be classed as constructive. So far two kinds of trusts commonly accepted as resulting have been found to be excluded on principle from such implied-in-fact trusts, and therefore thrown among imposed-by-law or constructive trusts. They are (a) Where A. pays the purchase money and B., the vendor, deeds to C., who is not A.'s wife or child and is not one to whom A. stands *in loco parentis*, and who takes on an express oral trust for A., and later C. or his heir, in reliance on the Statute of Frauds, repudiates the trust and not only refuses to give up the trust *res* but claims it as his own, and (b) Where A. pays B. the purchase money and B. deeds to C., who is A.'s wife or child or one to whom A. stands *in loco parentis*, and the presumption of a gift is rebutted by proof that C. took title on an express oral trust for A., and where C. or C.'s heir has repudiated the trust, in reliance on the Statute of Frauds, and not only refuses to give up the trust *res* but claims it as his own.

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88 N. E. 272 (1909); *Stubbings v. Stubbings*, 248 Ill. 406, 94 N. E. 54 (1911). Compare *Moore v. Horsley*, 156 Ill. 36, 40 N. E. 323 (1895); *McHenry v. McHenry*, 248 Ill. 506, 94 N. E. 84 (1911). And see the trust for third person cases: *Hovey v. Holcomb*, 11 Ill. 660 (1850); *Smith v. Hollenback*, 51 Ill. 223 (1869); *Lantry v. Lantry*, 51 Ill. 458 (1869); *Fischbeck v. Gross*, 112 Ill. 208 (1884); *Donlin v. Bradley*, 119 Ill. 412, 10 N. E. 11 (1887); *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116 (1892); *Davis v. Stambaugh*, 163 Ill. 557, 45 N. E. 170 (1896); *Crossman v. Keister*, 223 Ill. 69, 79 N. E. 58 (1906); *Ryder v. Ryder*, 244 Ill. 297, 91 N. E. 451 (1910). Compare *Evans v. Moore*, 247 Ill. 60, 93 N. E. 118 (1910), or a special confidential relation which would make retention of the *res* by the grantee a shocking betrayal of confidence. See *Pope v. Dapray*, 176 Ill. 478, 52 N. E. 58 (1898); *Stahl v. Stahl*, 214 Ill. 131, 73 N. E. 319 (1905); *Hilt v. Simpson*, 230 Ill. 170, 82 N. E. 588 (1907); *Ward v. Conklin*, 232 Ill. 553, 83 N. E. 1058 (1908); *Noble v. Noble*, 255 Ill. 629, 99 N. E. 631 (1912). Were the Illinois Supreme Court to accept the view that where A. buys property and has it conveyed to his wife or child on an oral trust for him, the trust is not resulting — in *Bachseits v. Leichtweis*, 256 Ill. 357, 100 N. E. 197 (1912), it was deemed resulting — it would probably deny him relief rather than adopt the fraudulent retention basis for raising constructive trusts. See *Murray v. Murray*, 153 Ind. 14, 53 N. E. 946 (1899); *Andrew v. Andrew*, 114 Ia. 524, 87 N. W. 494 (1901); *Mullong v. Schneider*, 155 Ia. 12, 134 N. W. 957 (1912). Compare *Godschalk v. Fulmer*, 176 Ill. 64, 51 N. E. 852 (1898).



## III.

*Constructive Trusts.*

Constructive trusts may be subdivided in various ways for classification purposes, but it would seem as if only three kinds of constructive trusts need be indicated here, namely, (1) those so-called resulting trusts which are really constructive; (2) those other constructive trusts which grow out of non-written trusts of land; (3) all other constructive trusts.

Some of the so-called resulting trusts that really are constructive have already been discussed. They are cases (a) and (b) last above mentioned.

So, too, it is frequently said that there is a resulting trust (c) where A. without authority uses the funds of B. to buy lands conveyed to A.,<sup>43</sup> but as the trust is not one of intention but is strictly a trust *in invitum* it seems clear that such a trust is not resulting but is constructive.<sup>44</sup>

Closely connected with the above are some constructive trusts recognized in some jurisdictions, which grow out of non-written trusts of land and are deserving on historical grounds, since they are the modern substitute for the original resulting uses, of being mentioned next to the foregoing constructive trusts, namely, (d) where A. without consideration conveys to C. upon an express oral trust for A. (the express oral trust rebutting the presumption of no trust found in the recitation of consideration and in the *habendum* to the use of C. contained in the deed), and C. or C.'s heir repudiates the trust in reliance on the Statute of Frauds and on the parolevidence rule, and where, in addition to repudiating the trust, C. or C.'s heir claims as his own the trust *res*. This class of constructive trusts is recognized in only a few jurisdictions, and outside of England and of one or two American jurisdictions is recognized practically only where there is a breach of a special confidential relation or where the grantee solicited and thereby unduly influenced the conveyance or had an actual fraudulent intent at the time he made the promise.<sup>45</sup>

<sup>43</sup> See 39 Cyc. 148-152.

<sup>44</sup> See *Shearer v. Barnes*, 118 Minn. 179 (1912).

<sup>45</sup> The English cases seem to make no distinction between the case of actual fraudulent intent at the time of conveyance and the case where there is an actual fraudulent

Next to the latter class of constructive trusts should be classed those constructive trusts (*e*) where A. conveys to C. or devises to C. upon an express oral trust for X. and the events specified in case (*d*) take place.

All other trusts imposed and enforced because of actual or constructive fraud may be left undivided and be lettered as subdivision (*f*) of constructive trusts.

Our classification being now complete, it is desirable to arrange our results in diagrams. Since we began by giving Maitland's diagram, it will be well to note what rearrangement in his diagram our discussion compels us to make. We must, of course, eliminate the word "implied," except as qualified by the words "in fact." Those qualifying words are rendered necessary by the traditional view that trusts can be implied by law. Then we must throw resulting trusts under the head of trusts by act of a party, rather than under the head of trusts by act of the law.

Our rearrangement of Maitland's diagram is:

Trusts	{	1. By act of a party	{	(a) Express.
			{	(b) Implied in fact or resulting.
		2. By act of the law	(a)	Constructive.

But we can omit the headings "by act of a party" and "by act of the law," since our classification of trusts as express, implied in

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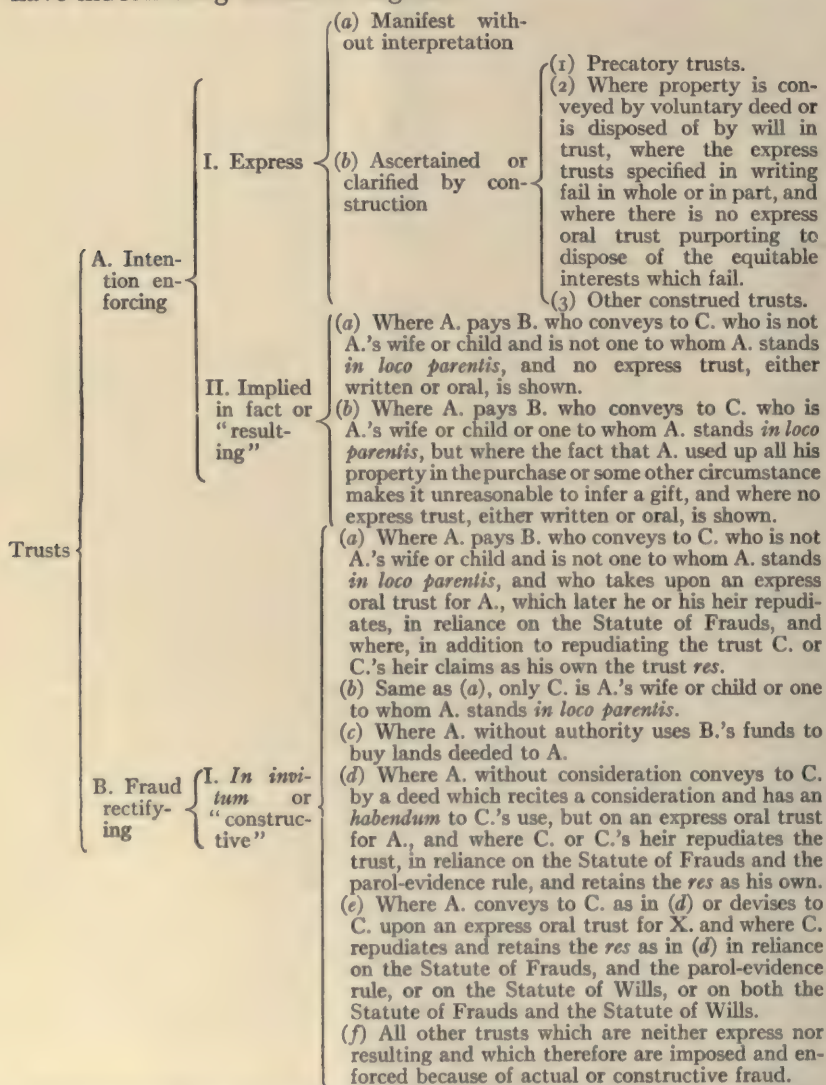
intent only at the time of the refusal to perform, and seem to regard the refusal to perform when coupled with retention of the property as necessarily fraudulent enough for constructive trust purposes. *Davies v. Otty*, 35 Beav. 208 (1865); *Haigh v. Kaye*, L. R. [1872] 7 Ch. App. 469; *Booth v. Turle*, L. R. [1873] 16 Eq. 182; *Marlborough v. Whitehead*, [1894] 2 Ch. 133; *De La Rochefoucauld v. Boustead*, [1897] 1 Ch. 106, [1898] 1 Ch. 550. For a Canadian case *in accord* see *Clark v. Eby*, 13 Grant Ch. (U. C.) 371. California seems at last to have adopted that rule in *Taylor v. Morris*, 163 Cal. 717 (1912), though the other California cases do not go beyond the limits of fraudulent intent at the start, or breach of a special confidential relationship, prescribed by the general American rule. New York seems to have at least one decision under the English doctrine. See *Medical College Laboratory v. New York University*, 178 N. Y. 153, 70 N. E. 467 (1904); *Lang v. Lang*, 131 N. Y. Supp. 891 (1911). So does Oklahoma. See *Flesner v. Cooper*, 134 Pac. 379 (1913).

A few other jurisdictions which have not rendered decisions contrary to the English rule have published opinions which leave the way open for that rule's adoption. See *Bowler v. Curler*, 21 Nev. 158, 26 Pac. 226 (1891), and *Hanson v. Svarverud*, 18 No. Dak. 550 (1909).

Because of the Statute of Frauds, if it is pleaded and relied on, and in some instances because of the parol-evidence rule, if it is relied on, the vast majority of American jurisdictions will not enforce any trust for a grantor who conveyed on an oral trust for himself or on an oral promise by the grantee to convey or to devise to the grantor, in



fact, and constructive, renders them unnecessary, and then we have the following tentative diagram:



the absence of a special confidential relationship between the parties or of undue influence or actual fraudulent intent on the part of the grantee found to have existed at the time of the conveyance. The Illinois oral-trust-for-the-grantor cases cited in note 42, *ante*, are typical of the general American view as to the claims of the grantor.

In Massachusetts no trust will be enforced for the grantor (*Walker v. Locke*, 5 Cush. 90 (1849); *Titcomb v. Morrell*, 10 Allen, 15 (1865); *Blodgett v. Hildreth*, 103 Mass. 484 (1870); *Gould v. Lynde*, 114 Mass. 366 (1874); *Fitzgerald v. Fitzgerald*,

There is no doubt that the foregoing diagram can be improved upon both in form and in substance. It is submitted only tentatively and as a basis for clarifying discussion. The sole justification for it and for this whole classification article is that a correct classification will be an aid to correct decision. No court of law would to-day give a greater effect to a breach of an implied-in-fact contract than it gives to a breach of an express contract for the same thing, and surely no court of equity that understood clearly that a resulting trust is an implied-in-fact trust enforced to prevent fraudulent retention would give fraudulent retention less weight when it follows an express oral trust than when it follows an implied-in-fact unwritten trust. The fact that the Statute of Frauds forbids the enforcement of the express oral trust while it expressly permits the enforcement of the implied-in-fact resulting trust is no justification for the attitude of chancery in those jurisdictions where the retention of the trust *res* in violation of the express oral trust is not deemed a constructive trust, for those courts ought to deem such action to raise a constructive trust, and if they did, its enforcement would be expressly authorized by the Statute of Frauds.

Correct judicial decisions do not always follow correct legal theory even when that theory is accepted, for correct theory may be misapplied, but the best hope of correct decision lies in the adoption of the best legal theory of rights and remedies. That is the sole excuse for an attempt to correct certain erroneous notions of the nature of resulting and of constructive trusts; but, since those erroneous notions are at times the reason for chancery's failure to furnish the appropriate remedy for fraudulent enrichment, it would seem to be a sufficient excuse for the attempt.

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168 Mass. 488, 47 N. E. 431 (1897); *Curry v. Dorr*, 210 Mass. 430, 97 N. E. 87 (1912); but the grantor can recover a money judgment for the value of the lands. See *Basford v. Pearson*, 9 Allen (Mass.) 387 (1864); *O'Grady v. O'Grady*, 162 Mass. 290, 38 N. E. 796 (1894); *Cromwell v. Norton*, 193 Mass. 291, 79 N. E. 433 (1906). Compare *Dix v. Marcy*, 116 Mass. 416 (1875). While that view is not as satisfactory as is the English doctrine, it is not as unsatisfactory as is the general American doctrine. See Ames, *Lectures on Legal History*, 428; 20 HARV. L. REV. 549, 552.



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CITIZENSHIP AS A GROUND FOR PERSONAL JURISDICTION. — The New York Court of Appeals has recently refused to recognize a judgment of a foreign court whose jurisdiction was based solely upon citizenship. *Grubel v. Nassauer*, 210 N. Y. 149. The defendant was a Bavarian subject domiciled in New York. He had filed notice of his intention of becoming a United States citizen, but before naturalization the judgment was secured against him on valid service by publication in Bavaria. Admitting the defendant's allegiance continued Bavarian, the court disregards that fact without giving a reason for doing so, and bases its decision on a case involving no question of citizenship or allegiance.<sup>1</sup> The precise point has apparently been presented only once for decision, but in denying allegiance as a ground for jurisdiction *in personam* the court departs from the reasoned opinions of eminent judges and text-writers.<sup>2</sup>

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<sup>1</sup> *Pennoyer v. Neff*, 95 U. S. 714 (1877). The court quotes a passage from this case (p. 727) to the effect that the process of one state has no force beyond its own boundaries, and then says, "It seems to us unreasonable that we should give greater respect to the judgments recovered in a foreign country than to a judgment recovered in one of our sister states." This reasoning involves an obvious *non sequitur*, since in the case quoted from the attempt was to get jurisdiction over a defendant who had no residence or domicile in the state and owed no allegiance thereto.

The court also cites a case in which a Canadian judgment against a Canadian residing in Wisconsin was refused recognition by a Wisconsin court. *Smith v. Grady*, 68 Wis. 215, 31 N. W. 477 (1887). The case is directly in point, but the Wisconsin court disregarded the question of allegiance altogether, relying on a previous Wisconsin case where no question of allegiance was involved.

<sup>2</sup> See *Douglas v. Forrest* (1828), 4 Bing. 686; *Cowan v. Braidwood*, 9 Dow. P. C.

It is to be regretted also that the court takes the view that foreign judgments are enforced solely by virtue of comity. This misleading word suggests that it is out of courtesy to the foreign sovereign that the judgment is enforced, a view which, "if really held by any serious thinker, affords a singular specimen of confusion of thought produced by laxity of language."<sup>3</sup> It is not a question of whether comity should induce us to respect a foreign judgment, or whether we should enforce foreign laws, but whether our law requires us to enforce the right acquired under the foreign law.<sup>4</sup> It is not a question of courtesy, but of the obligation of our own law.

The common-law principle is that courts are bound to enforce the right arising out of a foreign judgment rendered by a court having competent jurisdiction over the defendant, unless the defendant can show special facts making it unfair to do so.<sup>5</sup> Granting jurisdiction, the judgment raises a right in the plaintiff and a correlative duty in the defendant. The question is therefore whether our law considers the bond of allegiance a sufficient ground for conferring upon the sovereign's courts personal jurisdiction over an absent subject, and then, if competent jurisdiction, are there any special facts which negative the court's duty of enforcement.

The duty of obedience to the court's command is the common-law basis for jurisdiction *in personam*.<sup>6</sup> Thus service of process within the state gives competent jurisdiction, since every one within the state's boundaries must obey.<sup>7</sup> The duty assumed by contract by a non-resi-

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26, 35 (1840); *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877, 894; *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371; *Emanuel v. Symon* (1908), 1 K. B. 302, 309; *Hall v. Williams*, 23 Mass. 232, 240 (1828); *Henderson v. Staniford*, 105 Mass. 504 (1870); *Hunt v. Hunt*, 72 N. Y. 217, 238, 239 (1878); *Huntley v. Baker*, 33 Hun 578 (1884); *Re Denick*, 92 Hun 161, 36 N. Y. Supp. 518 (1895); *Hamill v. Talbott*, 72 Mo. App. 22 (1897); *Ouseley v. Lehigh Valley Trust & Safe Dep. Co.*, 84 Fed. 602 (1897). Also DICEY, *CONFLICT OF LAWS*, 2 ed., 361; WESTLAKE, *PRIVATE INTERNATIONAL LAW*, 5 ed., 401; PIGGOTT, *FOREIGN JUDGMENTS AND JURISDICTION*, Part I, 243 *et seq.*; NELSON, *PRIVATE INTERNATIONAL LAW*, 360; FOOTE, *PRIVATE INTERNATIONAL LAW*, 3 ed., 551, 552; WHARTON, *CONFLICT OF LAWS*, § 649, n. 3; 2 FREEMAN, *JUDGMENTS*, § 589; 6 HALSBURY'S *LAWS OF ENGLAND*, 284; note in 50 L. R. A. 577, 586. Cf. STORY, *CONFLICT OF LAWS*, §§ 540, 546, 548.

<sup>3</sup> See DICEY, *CONFLICT OF LAWS*, 2 ed., 10; FOOTE, *PRIVATE INTERNATIONAL LAW*, 547, 548; 1 WHARTON, *CONFLICT OF LAWS*, 3 ed., 2, n. 1, 5. The court in the principal case calls attention to a decision by the Supreme Court of the United States to support the proposition that foreign judgments are enforced by virtue of comity; but it is to be noticed that after an elaborate review of the subject of comity the court in that case comes to a conclusion consistent only with the view expressed above, though it continues to use the word "comity." *Hilton v. Guyot*, 159 U. S. 113, 202 (1894).

<sup>4</sup> See DICEY, *CONFLICT OF LAWS*, 2 ed., 10, 11; 1 WHARTON, *CONFLICT OF LAWS*, 3 ed., §§ 1, 1½.

<sup>5</sup> *Russell v. Smyth* (1842), 9 M. & W. 810, 819 (Eng.); *Williams v. Jones* (1845), 13 M. & W. 628, 633 (Eng.); *Schibsby v. Westenholz* (1870), 6 Q. B. 155, 159 (Eng.); WESTLAKE, *PRIVATE INTERNATIONAL LAW*, 5 ed., 396, 397; WHARTON, *CONFLICT OF LAWS*, 3 ed., §§ 1, 1½. In the United States this proposition is of course strengthened as between states by the constitutional provision as to full faith and credit. U. S. CONSTITUTION, Art. IV, § 1.

<sup>6</sup> *Russell v. Smyth* (1842), 9 M. & W. 810, 819 (Eng.); *Williams v. Jones* (1845), 13 M. & W. 628, 633 (Eng.); *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 159 (Eng.); *Hunt v. Hunt*, 72 N. Y. 217, 239 (1878); *Huntley v. Baker*, 33 Hun 578, 580 (N. Y. 1884).

<sup>7</sup> *Darrah v. Watson*, 36 Ia. 116 (1873).



dent foreigner to submit to a court's jurisdiction furnishes a valid ground for personal jurisdiction.<sup>8</sup> Persons domiciled within a territory are bound to obey the sovereign, and are therefore personally subject to his courts.<sup>9</sup> It would seem also that the duties arising out of citizenship ought to be enough to confer personal jurisdiction. Obedience to the sovereign is the first principle of all law. The obligations of allegiance are the foundations of government, and cannot be cast off without consent. Accepting a pension from, or enlisting in the service of, a foreign state without consent has been said to be criminal at common law, because inconsistent with allegiance to one's own sovereign.<sup>10</sup> Allegiance is an essentially bilateral relationship; subject and sovereign are mutually bound.<sup>11</sup> To hold it insufficient to give courts jurisdiction to render personal judgments is to disregard altogether its inherent nature and importance. In America, the ease with which allegiance to one state can be changed for that of another, our policy of free naturalization, and the usual coincidence of domicile and citizenship, have led to the thought of state citizenship as a matter more of convenience than of obligation. This popular tendency, however, can hardly justify the courts in disregarding the element of duty in allegiance. In contrast to this American tendency, English writers have consistently declared allegiance enough for the founding of personal jurisdiction.<sup>12</sup> And the same is apparently true of the other European countries.<sup>13</sup>

However, assuming the jurisdiction, the common law might perhaps refuse to enforce the foreign right acquired while the subject was making a *bonâ fide* attempt to throw off the old allegiance. Furthermore, it does not appear in the reports of the case whether the defendant received notice of the Bavarian proceedings.<sup>14</sup> This want of notice can be urged as a ground for not enforcing the foreign acquired right, since the doctrine of the common law has always been that "it is contrary to the first principles of reason and justice that . . . a man should be condemned before he is heard,"<sup>15</sup> or had an opportunity of being heard.<sup>16</sup> But in reaching the result on either of these grounds, the court would not be denying that allegiance is sufficient for personal jurisdiction.

<sup>8</sup> *Grover & Baker Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287 (1890); *Copin v. Adamson* (1875), 1 Ex. Div. 17 (Eng.). Cf. *St. Clair v. Cox*, 106 U. S. 350 (1882).

<sup>9</sup> *Douglas v. Forrest* (1828), 4 Bing. 686 (Eng.); *Glover v. Glover*, 18 Ala. 367 (1850); *Hunt v. Hunt*, *supra*; *Huntley v. Baker*, 33 Hun 578 (1884); *Martin v. Burns*, 80 Tex. 676, 16 S. W. 1072 (1891); *Re Denick*, *supra*; BEALE, JURISDICTION OF COURTS OVER FOREIGNERS, II, 26 HARV. L. REV. 283, 296; PIGGOTT, FOREIGN JUDGMENTS AND JURISDICTION, Part I, 248 *et seq.*

<sup>10</sup> See 3 COKE, INSTITUTES, 144; 1 EAST, PLEAS OF THE CROWN, 81; 4 BLACKSTONE'S COM. 122. The extra-territorial force of allegiance is further emphasized by statutory enactments to the same effect. Foreign Enlistment Act (Eng.), 1870 (33 & 34 Vict. c. 90). Cf. *Dobree v. Napier* (1836), 2 Bing. New Cases, 781.

<sup>11</sup> *United States v. Cruikshank*, 92 U. S. 542, 549, 551; 1 BLACKSTONE, 366; 1 WHARTON, CONFLICT OF LAWS, 50.

<sup>12</sup> See note 2, *supra*. WESTLAKE, PRIVATE INTERNATIONAL LAW, 5 ed., 25 *et seq.*; BEALE, JURISDICTION OF COURTS OVER FOREIGNERS, I, 26 HARV. L. REV. 193.

<sup>14</sup> *Grubel v. Nassauer*, 210 N. Y. 149. See same case in lower court, 71 Misc. 585, affirmed in 148 App. Div. 891.

<sup>15</sup> See Lord Ellenborough in *Buchanan v. Rucker*, 1 Camp. N. P. 63, 66 (1807).

<sup>16</sup> See *Fisher v. Lane*, 3 Wils. 297, 302 (Eng., 1772); *Rex v. Univ. of Cambridge*, 8 Mod. 148, 164 (Eng.); *Francis, Times & Co. v. Carr*, 82 L. T. R. 698, 703 (Eng., 1900); WHARTON, CONFLICT OF LAWS, 3 ed., § 649, n. 3; 6 HALSBURY'S LAWS OF ENG. 286.

THE EFFECT OF A SALE UNDER A CONSENT DECREE AS A STEP IN CORPORATE REORGANIZATION. — Some hesitation has been felt by the courts in allowing stockholders to join in the reorganization of an insolvent corporation and the purchase of its assets at a foreclosure sale.<sup>1</sup> When the assets are sold, the unsecured creditors lose the chance of realizing upon any future increase in value which might be enough to satisfy their claims. This is equally true when the assets at the time of the sale are worth less than the secured indebtedness. The secured creditors have a right to force a foreclosure by sale to third parties free from claims of unsecured creditors, and when made under a decree of court no objection can ordinarily be made collaterally except for fraud in the decree.<sup>2</sup> But the stockholders, on account of their control over the assets, are looked upon as standing in a kind of fiduciary relation to the creditors, and it seemed a breach of this duty to allow them to purchase and to cut off the creditors' interest in a possible future value by their own private speculation. The situation is somewhat analogous to where one in a fiduciary capacity sells to himself as an individual. It has been even asserted that the assets of an insolvent corporation are held in trust for the creditors.<sup>3</sup> Where there is an express fiduciary relation, as in the case of a trust or executorship, it is clear that the trustee may not buy in the trust *res* even under a decree of court.<sup>4</sup>

There are, however, material differences in the case of stockholders buying the assets. There probably is no actual trust, and clearly the stockholders are not trustees. Furthermore, in the case of foreclosures of corporate assets the amount of capital required to purchase is so large and the market so limited that it is difficult to realize fair value for the assets.<sup>5</sup> This is most often accomplished by a reorganization. Upon grounds of policy to increase the market, stockholders have been allowed to join in such reorganizations, and to purchase at foreclosure sale when the sale is confirmed by judicial decree.<sup>6</sup> It is clear, however, that good consideration must be paid for the assets to the old insolvent corporation by all who join in the purchase. A transfer to a new corporation which merely gives new stock to the old stockholders in exchange for the old stock would be fraudulent. No consideration is given which is subject to creditors of the corporation.<sup>7</sup> This would be true even though the assets were worth less than the secured indebtedness,<sup>8</sup> for the creditors thereby lose the possibility of sharing in an increase of value and nothing has been given to the debtor corporation in exchange. Thus, while stockholders may join in a *bonâ fide* purchase they should not be given a special benefit from the reorganization in order to induce them not to

<sup>1</sup> See *Northern Pacific Ry. v. Boyd*, 228 U. S. 482, 503.

<sup>2</sup> *Robinson v. Iron Ry. Co.*, 135 U. S. 522; *Kent v. Lake Superior Ship Canal, Ry. & Iron Co.*, 144 U. S. 75.

<sup>3</sup> See 20 HARV. L. REV. 401, where this doctrine is criticized.

<sup>4</sup> *Michoud v. Girod*, 4 How. (U. S.) 503; *Obert v. Hammel*, 18 N. J. L. 73.

<sup>5</sup> See 3 COOK, CORPORATIONS, 6 ed., § 886.

<sup>6</sup> *Wood v. Dubuque R. Co.*, 28 Fed. 910; *Thornton v. Wabash Ry. Co.*, 81 N. Y. 462. See 5 THOMPSON, CORPORATIONS, 2 ed., § 6007.

<sup>7</sup> When an insolvent debtor conveys property, the consideration paid must be such that the creditors may reach it or the conveyance is fraudulent.

<sup>8</sup> An insolvent may not give away property though it be encumbered to its full value. *Garrison v. Monaghan*, 33 Pa. 232.



obstruct the foreclosure and reorganization.<sup>9</sup> The stockholders clearly owe a duty to act in such corporate transactions for the benefit of creditors. Any special benefit to themselves for which they do not pay full value is analogous to an interest which a debtor who conveys seeks to retain for himself.<sup>10</sup> That which should have constituted a part of the purchase price has been diverted from the corporation which was entitled to it, to the stockholders who owe a duty to see that the full value of the assets are applied to creditors' claims. It follows that when by the reorganization agreement new stock, instead of being given to old stockholders, is sold to them for less than its value in order to prevent objection by the stockholders, the conveyance thereby brought about is fraudulent.<sup>11</sup> Even where the sale under judicial decree is for less than the secured indebtedness, a possibility of future profits has been improperly given to the stockholders.<sup>12</sup> In such a transaction, which is constructively, if not actually, fraudulent, the fact that the sale was under a "consent decree," which was a mere step in the improper plan, should be no more conclusive of the fairness of the sale than is a decree under which a trustee buys the trust *res*. The assets in the hands of the new corporation, therefore, should be subject to the claims of an unsecured creditor. Such seems to have been the decision of the United States Supreme Court last May.<sup>13</sup> *Northern Pacific Railway Co. v. Boyd*.<sup>14</sup> A more recent case purports to apply the reasoning of the *Boyd* case in holding a consent decree inconclusive of the value in another corporate reorganization. *Mechanics & Metals Nat. Bank v. Howell*, 207 Fed. 973. Here the creditors of an insolvent corporation purchased its assets under a consent decree, and claimed to apply to their claims the value as set by the decree, and then hold the sureties for the balance. The creditor taking over the assets of the principal debtor has a duty to take them at their real value.<sup>15</sup> The court admits that when the value is determined by competitive bidding the decree of sale would be conclusive of this value. But where, as the court found, the value under the decree was an arbitrary one set in the plan of reorganization,<sup>16</sup> and the judicial decree was

<sup>9</sup> *Chicago, R. I. & Pac. R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Louisville Trust Co. v. Louisville, N. A. & Ch. Ry. Co.*, 174 U. S. 674.

<sup>10</sup> The conveyance of property by an insolvent debtor reserving an interest to the debtor is clearly fraudulent. *Robinson v. Elliott*, 22 Wall. (U. S.) 513; *Hurd v. Ascherman*, 117 Ill. 501, 6 N. E. 160.

<sup>11</sup> *Central of Georgia Ry. Co. v. Paul*, 93 Fed. 878; *St. Louis Trust Co. v. Des Moines, N. & W. Ry. Co.*, 101 Fed. 632. But see *Wenger v. Chicago, etc. R. Co.*, 114 Fed. 34.

<sup>12</sup> But see *Paton v. Northern Pacific Ry. Co.*, 85 Fed. 838, where, however, the court considered that the stockholders in the reorganization under consideration in the *Boyd* case paid fair value for the new stock. Also *Wenger v. Chicago, etc. R. Co.*, *supra*.

<sup>13</sup> The dissenting justices were of the opinion that the stockholders properly joined in the organization and paid what the stock was worth, and also considered that the creditor was barred of relief by laches. The majority seem to have asserted that the stockholders were estopped to deny that they had received an improper benefit. For a discussion of their reasoning see footnote 16.

<sup>14</sup> 228 U. S. 482. See also the same case in the lower courts, 170 Fed. 779, 177 Fed. 804.

<sup>15</sup> *Insurance Co. v. Randall*, 42 La. Ann. 260, particularly p. 269.

<sup>16</sup> The court went further, and held that since the creditors formed the new corporation and issued paid-up capital stock to an amount far exceeding in par value the

given by consent in aid of such plan, it seems proper to look behind the decree, as the court did, to discover the true value as a going concern, in which condition the creditor preserved the assets. While there is no such attempt to improperly benefit stockholders at the expense of creditors as in the *Boyd* case, there is an attempt to inequitably benefit the creditor at the expense of the surety. Thus the decisions of the two cases seem analogous as to the effect of such a decree in a plan of reorganization where there are strong equitable reasons for disregarding it.<sup>17</sup>

**PROVABILITY IN BANKRUPTCY OF CLAIMS UNDER EXECUTORY CONTRACTS.** — There can be no doubt of the advantages to be gained by permitting proof against a bankrupt's estate for damages on executory bilateral contracts.<sup>1</sup> Where the contract has been broken by the bankrupt party before bankruptcy, it is of course clear that proof will be allowed.<sup>2</sup> But where there has been no breach before the bankruptcy proceedings, a question of great difficulty is presented. The authorities upon this point are meagre and in conflict. Recently the Circuit Court of Appeals for the Seventh Circuit allowed proof on the ground that the bankruptcy proceedings constituted an anticipatory breach of the

amount of the creditors' claims and received an amount of such stock equal in par value to one hundred per cent of their claims by the terms of the agreement, that they were estopped to deny that the paid-up stock was worth its face value and represented the actual value of the assets. The court went on the authority of the *Boyd* case. In that case the paid-up stock of the new corporation was issued of a par value far in excess of the amounts paid as assessments, and the old stockholders participating in the reorganization were given such stock in exchange for the old stock plus the assessments. In further supporting its view that the stockholders had retained a valuable interest, the court said that since it was agreed in the reorganization that the property was equal in value to the paid-up stock, the stockholders could not be heard now to assert as against the plaintiff, an unsecured creditor, that this was not true. It is hard to support this on any principles of estoppel. It is submitted that it is at most a *dictum*, and was not meant to be carried to the extreme seen in the later case.

The policy of the law is opposed to the issue of paid-up stock for less than its value. See 4 THOMPSON, CORPORATIONS, 2 ed., §§ 3904, 3911. Those subscribing who have not paid the full value may be compelled to pay the full value by creditors who have acted in reliance. *Bonâ fide* stockholders who have paid full value can complain. *Barsus v. Gates*, 89 Fed. 783. The policy of the law is also to protect the public from the danger of paid-up stock which does not represent actual capital. In the *Boyd* case the plaintiff was not in any way deceived, nor did he act in reliance upon the stock being paid-up stock. If it be assumed that the stockholders paid the actual value for the new stock, it is hard to see why public policy should dictate that they should be penalized by granting a pure benefit to the plaintiff in the form of a claim against the new corporation. Similarly, in the *Howell* case, the surety was not deceived, and invoking any theory by which the surety is given a pure benefit at the expense of the organizers would seem to be improper.

<sup>17</sup> Apparently the doctrine of the *Boyd* case is taken to be that no objection by interested parties is necessary at the time of the decree. Whether the Supreme Court means to go to this length is doubtful in view of the fact that in the *Boyd* case the majority considered that the plaintiff was in no position to object at the time of the decree.

<sup>1</sup> To refuse proof is to deprive bankrupts of the full benefits of discharge, by forcing them to bear the burden of many claims which cannot be released and which will become due soon after the bankruptcy.

<sup>2</sup> *In re Silverman*, 101 Fed. 219; *In re Stern*, 116 Fed. 604; *In re Saxton Furnace Co.*, 142 Fed. 293; *In re Spittler*, 151 Fed. 942.



contract which gave rise to a fixed liability at the time of the filing of the petition. *In re Scott Transfer Co.*, Circuit Court of Appeals, Seventh Circuit, October Term, 1913. In striking contrast, a federal district court, last October, denying that bankruptcy was an anticipatory breach, refused to allow proof of the contingent claim for future damages.<sup>3</sup>

The difficulty arises through failure of the present bankruptcy act to provide expressly for the proof of contingent claims.<sup>4</sup> This is probably due to a legislative oversight, for both the acts of 1841 and 1867 made provision for proof in such cases.<sup>5</sup> But though the broad language of § 63, a, 4, might permit of the same construction, our judges, influenced apparently by the severity of the English courts toward contingent claims,<sup>6</sup> have usually held them incapable of proof. It is true that an exception has been made in the case of a bankrupt indorser of commercial paper which was not dishonored until after bankruptcy.<sup>7</sup> But the general tendency has been to hold that § 63, a, 4, is modified by the more strict language of § 63, a, 1,<sup>8</sup> and that no claims are provable, unless they are fixed liabilities at the time of the filing of the petition.<sup>9</sup>

In order to render executory contracts provable within this construction, the courts have sought for some means by which they may hold that there is a fixed liability upon the contract at the time the petition is filed. This they have found in the doctrine of anticipatory breach. But grave difficulties at once suggest themselves when we endeavor to hold bankruptcy a breach of this nature. If bankruptcy is an anticipatory breach, why is not the trustee precluded from ever assuming performance for the benefit of the bankrupt's estate? Allowing the trustee to perform is not to be reconciled, unless we say that bankruptcy, though an actionable anticipatory violation of the contract, is not so material a breach as to give the non-bankrupt party a defense to refusing to go on with the contract.<sup>10</sup> This, however, presents a radical, if not an unwar-

<sup>3</sup> *In re Levy & Sons Co.*, 208 Fed. 479. In this case the claimant entered into an employment contract to serve the Levy Company for a year on a weekly salary. In the middle of the year, no breach of contract through failure to pay salary having occurred, the company became an involuntary bankrupt. It was held that no claim for damages against the estate could be proved.

<sup>4</sup> The provisions of § 63, a, important for this discussion are as follows: "Debts of the bankrupt may be proved and allowed against his estate which are (1), a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him whether then payable or not . . . (4), founded upon an open account or upon a contract express or implied."

<sup>5</sup> 5 U. S. STAT. AT LARGE, p. 445; 14 U. S. STAT. AT LARGE, p. 526.

<sup>6</sup> For a collection of the English authorities under various acts, see a learned note in WILLISTON, CASES ON BANKRUPTCY, 491.

<sup>7</sup> *Moch v. Market Street Nat. Bank*, 107 Fed. 897; *In re Gerson*, 105 Fed. 891; *In re Philip Semmer Glass Co.*, 135 Fed. 77; *In re Smith*, 146 Fed. 923. *Contra*, *In re Schaefer*, 104 Fed. 973.

<sup>8</sup> *In re Roth & Appel*, 181 Fed. 667; *In re Adams*, 130 Fed. 381. The important features of this section are given in note 4, *supra*.

<sup>9</sup> *In re Pettingill*, 137 Fed. 143 (guarantee of stock dividends); *Leader v. Mattingly*, 140 Ala. 444, 37 So. 270 (indemnity bond); *In re Keeton, Stell & Co.*, 126 Fed. 426 (note to pay attorneys' fees on contingency); *In re Thompson Milling Co.*, 144 Fed. 314; *In re Garlington*, 115 Fed. 999; *In re Ells*, 98 Fed. 967 (agreement in a lease providing that the lessor might reënter for default in rent and re-rent the premises, charging any loss of rental to the bankrupt); *In re Roth & Appel*, *supra*.

<sup>10</sup> It may be asked how, if this be true, there can be a fixed liability at the time of the bankruptcy petition for damages for breach of the entire contract. The answer

ranted, extension of the doctrine of anticipatory breach as applied to ordinary contracts. For usually where courts allow an action because of an anticipatory breach the contract is treated as entirely broken. Moreover, it is ordinarily stated there must be immediate action by the injured party.<sup>11</sup> But the proving of the claim, the only action taken by the creditor, cannot in the nature of things be done immediately on the filing of the petition. Further, the courts do not consistently apply the doctrine. While bankruptcy is held an anticipatory breach of contracts of sale,<sup>12</sup> no case has been found under the present act in which this view was applied to an employment contract.<sup>13</sup> Again, the courts are inclined to restrict the doctrine to cases where the bankruptcy proceeding is voluntary,<sup>14</sup> thus refusing to permit proof of perhaps the majority of such contract claims.

If claims under executory bilateral contracts are to be held provable on a satisfactory basis, it must be upon the bold ground that contingent claims, if capable of liquidation,<sup>15</sup> should be allowed proof under the present act. There seems a tendency on the part of some courts to take this view, provided the contingency is bound to occur within a year from the adjudication,<sup>16</sup> and hence the liability to become fixed within the time named under the act for proving claims.<sup>17</sup> But if the claim is contingent when the petition is filed, it is not rendered any the less so by the fact of becoming absolute within a year. Moreover, there would

would seem to be that under § 63, a, the question is one of fixed liability only and not of damages. Whether by virtue of later action by the trustee the damages will become payable for a mere temporary breach or for breach of the entire obligation is a question of the liquidation of the liability and not of its existence at the time of filing the petition.

<sup>11</sup> See *Johnstone v. Milling*, 16 Q. B. D. 460, 467, 473; *Zuck v. McClure*, 98 Pa. St. 541; *Dalrymple v. Scott*, 19 Ont. App. 477; WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 3 ed., 367.

<sup>12</sup> *In re Swift*, 112 Fed. 315; *In re Neff*, 157 Fed. 57.

<sup>13</sup> For a decision sustaining the doctrine in an employment contract under the act of 1867 see *Ex parte Pollard*, 19 Fed. Cas. 942. The courts to-day, however, consider the bankruptcy as absolutely terminating all relations between employer and employee, leaving no duty or right of action to either party. *In re Inman & Co.*, 171 Fed. 185; *In re American Vacuum Cleaner Co.*, 192 Fed. 939. The above decisions are founded upon a like view upheld by some courts as to landlord and tenant. *In re Jefferson*, 93 Fed. 948; *In re Hays, Foster & Ward Co.*, 117 Fed. 879. It is submitted that these cases precluding the trustee from taking over the lease or contract are erroneous. *Watson v. Merrill*, 136 Fed. 359; *Colman Co. v. Withoft*, 195 Fed. 250.

<sup>14</sup> *In re Inman & Co.*, 175 Fed. 312; *In re Imperial Brewing Co.*, 143 Fed. 579. *Contra, In re Pettingill*, 137 Fed. 143. This is doubtless due to the refusal of courts outside bankruptcy to apply the anticipatory breach doctrine to cases where a party has stated nothing but his inability to perform the contract. *Johnston v. Milling*, 16 Q. B. D. 460. Any such limitation upon the doctrine of anticipatory breach, however, seems incorrect, for, provided it is evident that the contract will not be carried out, the question of the ability of the repudiating party to perform should be quite immaterial. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 3 ed., 368.

<sup>15</sup> It is interesting to note that when the question of proving contingent claims was carried to the Supreme Court, proof was denied not merely upon the ground of contingency but that the claim was incapable of liquidation. *Dunbar v. Dunbar*, 190 U. S. 340.

<sup>16</sup> *In re James Dunlap Carpet Co.*, 163 Fed. 541; *In re Caloris Mfg. Co.*, 179 Fed. 722. For a discussion in support of this theory, see 14 COL. L. REV. 158.

<sup>17</sup> § 57 n. "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication. . . ."



seem no force in arguing that where claims become fixed and so liquidated within that time, they are thereby provable, for elsewhere in the present act ample provision has been made for the liquidation of any claims by such means as the bankruptcy court may see fit to employ.<sup>18</sup> Hence these two decisions show a tendency toward the correct result of permitting proof of contingent claims wherever capable of liquidation, which it is to be hoped the courts will finally reach.

DOMICILE OF UNITED STATES SOLDIERS SERVING IN "FEDERAL TERRITORY." — A person *sui juris* can change his domicile only by the concurrence of residence in a place and intention to remain there indefinitely.<sup>1</sup> Intention connotes freedom of choice. Accordingly, prisoners confined under duress cannot acquire domiciles in prison,<sup>2</sup> nor can paupers in poor-houses.<sup>3</sup> Exiles and refugees, on the other hand, can attain new domiciles;<sup>4</sup> they have freedom of choice, though it is somewhat circumscribed. It would seem, therefore, that a soldier cannot acquire a domicile in the barracks or in any fort or post where he is under compulsion to serve. But a soldier whose rank or duties permit him a choice of several places for his headquarters could establish a domicile in the post he chooses.<sup>5</sup> It follows that the English rule that a soldier in the service of his sovereign always retains the domicile he had on entering the service, wherever he is stationed,<sup>6</sup> is too broad. So also the rule, apparently adopted in England, that one entering the military service of a foreign sovereign becomes domiciled in the territory of such sovereign,<sup>7</sup> should be nothing

<sup>18</sup> § 63, b. "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

<sup>1</sup> *Munro v. Monro*, 7 Cl. & F. 842; *Mitchell v. United States*, 21 Wall. (U. S.) 350. The word "indefinitely" is perhaps not sufficiently strong as applied to the English cases, most of which either expressly or inferentially require an intention to remain permanently. Most American courts, on the contrary, seem satisfied with an intention to remain indefinitely. See JACOBS, DOMICIL, §§ 162-174, in which the authorities are collected and commented on. See 3 Beale, CASES ON CONFLICT OF LAWS, 510.

<sup>2</sup> *Barton v. Barton*, 74 Ga. 761; *Topsham v. Lewiston*, 74 Me. 236; *Baltimore v. Chester*, 53 Vt. 315. See *Burton v. Fisher*, Milward, 183, 191-192. See DICEY, CONFLICT OF LAWS, 2 ed., 147.

<sup>3</sup> *Clark v. Robinson*, 88 Ill. 498. *Contra*, *Sturgeon v. Korte*, 34 Oh. St. 525.

<sup>4</sup> See DICEY, CONFLICT OF LAWS, 2 ed., 147-8; JACOBS, DOMICIL, § 285.

<sup>5</sup> It is so held in the analogous case of soldiers whose duties do not require them to serve in one post or barracks. See *Moorar v. Harvey*, 128 Mass. 219; *Ames v. Duryea*, 6 Lans. 155, aff'd 61 N. Y. 609. It seems that a soldier who retains his rank in the service of his sovereign, though no longer in active service, can get a domicile in the country of another sovereign. See *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285, 319. A soldier on furlough may acquire a domicile in a place even though he may be called back to service at any time. *Attorney-General v. Pottinger*, 6 H. & N. 733. But see *Craigie v. Lewin*, 3 Curt. Eccl. 435.

<sup>6</sup> Dicey states this rule. DICEY, CONFLICT OF LAWS, 2 ed., 155. It is approved in *Ex parte Cunningham*, 13 Q. B. D. 418, 425.

<sup>7</sup> Dicey cautiously inserts "probably" into his statement of this rule. DICEY, CONFLICT OF LAWS, 2 ed., 155. It seems to be assumed in *President of United States v. Drummond*, 33 Beav. 449; and is made by counsel *arguendo*, and not contradicted by the court, in *Somerville v. Somerville*, 5 Ves. Jr. 750, 758.

more than a presumption of fact.<sup>8</sup> Unless it relates to domicile by operation of law, it assumes that every one serving in a foreign country in the foreign sovereign's army intends, if he can form an intention, to settle in such sovereign's country, which obviously may not be true. From the foregoing propositions it may be stated broadly that any soldier can form *animus manendi* in any place which he can freely leave; but there is always a strong presumption, from the character of soldier life,<sup>9</sup> that he does not do so.

Many United States soldiers serve in territory which, by a state's consent, the United States exclusively controls.<sup>10</sup> If an officer's presence at a particular United States military post is due to an exercise of his volition and an *animus manendi* is shown, where is his domicile for purposes of testamentary succession? <sup>11</sup> Now, where one sovereign by treaty allows another to enforce certain of its laws in a part of the former's territory, as in Shanghai,<sup>12</sup> a state domicile<sup>13</sup> acquired by residence *animo manendi* in that portion of territory is a domicile in the state of which such territory is a part.<sup>14</sup> Anglo-Chinese domiciles are impossible, because Anglo-China is not a legal unit; <sup>15</sup> it is only part of the legal unit, China, and still under its sovereignty. So it is with territory of one of our states over which the federal government is allowed control. It is part of a legal unit, the state in which it is situated; <sup>16</sup> hence a soldier who resides in such territory *animo manendi* acquires a state domicile in the state in which such territory lies.

Such "federal territories," then, are parts of the states wherein they are. Real territories, such as Alaska, are themselves separate legal units, each being governed substantially by its own system of law. Therefore there is no legal unit composed of all territory exclusively under federal control, and a recent case proceeding on that assumption is erroneous. *Matter of Grant*, 83 N. Y. Misc. 257. The deceased, after acquiring

<sup>8</sup> It is so treated in *State, ex rel. Toner, In re Graham*, 39 Ala. 454, 456. See JACOBS, DOMICIL, §§ 209, 300.

<sup>9</sup> See *Re Steer*, 28 L. J. (Ex.) 22, 25.

<sup>10</sup> Such as Governor's Island and Fort Leavenworth.

<sup>11</sup> Or for any other purposes depending on the law of the legal unit, — in this country, the state, — which controls such matters.

<sup>12</sup> Several nations, including the United States and England, now have such treaties with China.

<sup>13</sup> There may be domicile for different purposes. Thus it may be necessary to find whether a man is domiciled in a state, or in any one of the smaller divisions of a state, such as a county or city. Jacobs says domicile may be national, relating to nations; quasi-national, relating to legal units composing nations, such as the states in this country; and municipal, relating to the smaller divisions of legal units. JACOBS, DOMICIL, § 77. Since, however, a man's rights are fixed by the law of the legal unit in which he is domiciled, "national" domicile would seem to be, if not impossible, at least non-existent. It seems sufficient, then, at least in this country, to divide domicile into state and municipal domicile. The most important questions relate to the former, and most of the rules on domicile apply to it. Thus the rule that a man cannot be without a domicile applies to it alone; a man may be without a municipal domicile. See *In re Craignish*, [1892] 3 Ch. 180, for such a case. In England, domicile is important solely with relation to legal units, i. e., domicile is understood as what is here termed "state domicile." See DICEY, CONFLICT OF LAWS, 2 ed., 93-96.

<sup>14</sup> *Mather v. Cunningham*, 105 Me. 326, 74 Atl. 809.

<sup>15</sup> See *In re Tootal's Trusts*, 23 Ch. D. 532, 538.

<sup>16</sup> Cf. *Chicago, etc. Ry. Co. v. McGlinn*, 114 U. S. 542, 547, saying that the government of Kansas extends over the Fort Leavenworth Reservation.



a domicile of choice in New York, joined the army, and was stationed consecutively in Texas, at Governor's Island in New York, in Chicago, and again, as general, at Governor's Island, where his headquarters were when he died. He intended to live in the District of Columbia after leaving the island. The surrogate held that his residence in federal territory, Governor's Island, combined with his intention to live in federal territory, the District of Columbia, gave him a domicile in federal territory, so that his estate was not subject to the New York transfer tax. It would seem that after entering the army the deceased in fact abandoned his state domicile in New York. Upon his return to Governor's Island he had not such *animus manendi* as would give him a municipal domicile there, or enable him to reacquire *in fact* his state domicile in New York. Thus the real issue raised by the facts of the principal case is whether, when in fact he abandoned New York as his domicile, his domicile of origin reverted or his domicile of choice continued, since no new domicile had been acquired. The American rule, which is certainly preferable as applied to American conditions, is that a domicile of choice continues until superseded;<sup>17</sup> hence the deceased was domiciled in New York at his death.

WIFE'S RIGHT TO SET ASIDE VOLUNTARY ANTE-NUPTIAL CONVEYANCES. — While early established in England that a secret voluntary conveyance, made by a woman after engagement and before marriage, might be set aside by the husband as a fraud upon his marital rights,<sup>1</sup> it remained for American courts to extend like protection to the dower rights of the wife.<sup>2</sup>

In many of the cases, where active representations concerning the fiancé's property were used to induce the marriage, the result is clear;<sup>3</sup> but it is probable that in England constructive fraud, based on mere passive concealment, was sufficient ground for relief,<sup>4</sup> and such is certainly the result of many American cases.<sup>5</sup> While this reasoning suggests

<sup>17</sup> On this point the English and American rules conflict, the former holding that the domicile of origin reverts; the latter, that the domicile of choice continues. See *Udny v. Udny*, L. R. 1 H. L. Sc. 441; *Desmare v. United States*, 93 U. S. 605, 610. For a discussion of the relative merits of the two rules, and a conclusion in favor of the American view, see JACOBS, DOMICIL, §§ 110-113, and 190-203.

<sup>1</sup> *Carleton v. Earl of Dorset*, 2 Vern. 17.

<sup>2</sup> The question has not arisen in England. But see *McKeogh v. McKeogh*, Ir. R. 4 Eq. 338, 346; 1 BRIGHT, HUSBAND AND WIFE, 357; 2 VAIZEY, SETTLEMENTS, 1587.

<sup>3</sup> See *Rice v. Waddill*, 168 Mo. 99, 67 S. W. 605; *Hach v. Rollins*, 158 Mo. 182, 59 S. W. 232; *Swaine v. Perrine*, 5 Johns. Ch. (N. Y.) 482; *Petty v. Petty*, 4 B. Mon. (Ky.) 215; *Dunbar v. Dunbar*, 254 Ill. 281, 98 N. E. 563; *Bookout v. Bookout*, 150 Ind. 63, 49 N. E. 824.

<sup>4</sup> *Goodard v. Snow*, 1 Russ. 485.

<sup>5</sup> *Ward v. Ward*, 63 Oh. St. 125, 57 N. E. 1095, 51 L. R. A. 858; *Arnegard v. Arnegard*, 7 N. Dak. 475, 75 N. W. 797, 41 L. R. A. 258; *Smith v. Smith*, 6 N. J. Eq. 515 (*semble*); *Goff v. Goff*, 60 W. Va. 9, 53 S. E. 769; *Baird v. Stearne*, 15 Phila. 339, 39 Leg. Int. 374; *Chandler v. Hollingsworth*, 3 Del. Ch. 99; *Leach v. Duvall*, 8 Bush. (Ky.) 201; *Wallace v. Wallace*, 137 Ia. 169, 114 N. W. 913. See also *Babcock v. Babcock*, 53 How. Pr. (N. Y.) 97; *Pomeroy v. Pomeroy*, 54 How. Pr. (N. Y.) 228. But see *Butler v. Butler*, 21 Kan. 521, 525; *Alkire v. Alkire*, 134 Ind. 350, 32 N. E. 571.

the recognition of an equitable dower, analogous to the equitable interest of a contract vendee of land, such hypothesis is nowhere<sup>6</sup> relied on by the courts, and its infirmities seem obvious.

In two recent decisions, supported by some authority,<sup>7</sup> it is argued, from the analogy of fraudulent conveyances by a debtor, that the conveyance is in fraud of the prospective inchoate dower, which is to attach upon marriage. *Deke v. Huenkemeier*, 260 Ill. 131, 102 N. E. 1059; *McAulay v. McAulay*, 79 S. E. 785 (S. C.). While a person who reasonably foresees that he will contract debts owes a duty to preserve property sufficient to secure them, unless engagement for some other reason raises a duty to retain realty to which dower may later attach, there is no foreseeable obligation on the part of one contemplating matrimony to possess at marriage any real estate at all.

The true basis for relief, then, as pointed out in a few modern decisions,<sup>8</sup> must be that there is a duty growing out of the peculiarly close fiduciary relationship of persons about to enter a status involving such sacred obligations as marriage. That persons affianced do stand in a fiduciary relationship to each other is also recognized in those cases which allow a wife to set aside an otherwise valid ante-nuptial contract to relinquish dower, when, though no misrepresentation appears, there was not a full disclosure of the amount of the fiancé's real estate.<sup>9</sup> Broadly defined, the prospective husband's duty should be to act with scrupulous regard for the future prosperity of the mutual enterprise in which the two are about to embark, and particularly to safeguard those material incidents which the law attaches to that relation for the benefit of the wife. This relationship should also impose the duty to disclose fully all circumstances which in any way affect her interests, either present or in prospect.

It would seem that the man's breach of this duty by a secret voluntary conveyance of land, if discovered before marriage, would be just excuse for the fiancée to repudiate her promise.<sup>10</sup> Such a conclusion is not difficult to reach if the promise was made with the expectation of receiving dower in this specific land, and it is submitted that even where she was ignorant of the fact of ownership, such disregard of her interests would justify the termination of the engagement.

If the conveyance be discovered before marriage, it seems obvious that repudiation is the only remedy immediately available, since it would be fruitless to extend specific protection to an incident depending for complete validity on a primary obligation (the duty to keep the promise to marry) not specifically enforceable.

In addition, it is held that where the marriage relation is entered into after knowledge of the breach of duty, the right to set aside the con-

<sup>6</sup> Except perhaps in *Poston v. Gillespie*, 5 Jones Eq. (N. C.) 258, 262.

<sup>7</sup> See *Youngs v. Carter*, 10 Hun (N. Y.) 194; *Higgins v. Higgins*, 219 Ill. 146, 76 N. E. 86; *Kelly v. McGrath*, 70 Ala. 75. In view of the weighty *dicta* to the effect that the statute of 13 Eliz. is merely declaratory of the common law, it is perhaps unsound to argue against this analogy that the creditor's right is statutory. See *Cadogan v. Kennett*, 2 Cowp. 432, 434, per Lord Mansfield.

<sup>8</sup> *Ward v. Ward*, *supra*; *Arnegard v. Arnegard*, *supra*.

<sup>9</sup> *Hessick v. Hessick*, 169 Ill. 486, 48 N. E. 712; *Taylor v. Taylor*, 144 Ill. 436, 33 N. E. 532; *Kline v. Kline*, 57 Pa. 120.

<sup>10</sup> See *Wharton v. Lewis*, 1 Car. & P. 529; *Cheshire v. Payne*, *supra*, 627; *Jordan v. Black*, *supra*, 147.



veyance is lost;<sup>11</sup> a result at least doubtful on principle, since *prima facie* it amounts to a denial of the most adequate remedy for an admitted wrong on the ground that the wronged person has taken the only possible course to make it available. It may be argued that marriage after knowledge affords ground for presuming consent to the conveyance; but if merely a rebuttable presumption of fact it could hardly support the result of the cases cited, and if a conclusive presumption of law, it is submitted, it is likely to do violence to the truth as many times as otherwise. Conceivably, the desirability of interfering as little as possible in a relation so peculiarly personal as that of marriage might be ground for a rule of policy against affording post-nuptial relief for ante-nuptial wrongs which were discovered before the relation had commenced.

If, in violation of his duty to disclose, the conveyance is kept secret until after the marriage, the wife has been placed, by what amounts to active misrepresentation, in a situation where this right to terminate the relation is no longer available, and so specific restitution is the only adequate remedy. If the above definition of the fiancé's duty be accepted, those decisions which hold that a secret gift of land to one to whom there is some moral obligation, as a dependent child, or an aged mother, is not a fraud upon the intended wife,<sup>12</sup> would seem difficult to reconcile. Certainly the prospective dower interest is no less impaired, nor does the moral obligation to the grantee seem sufficient to justify concealment from the wife.<sup>13</sup> But since the conflicting claims of both wife and donee are essentially equitable, the wrong of the grantor in concealing the gift from his fiancée does not seem sufficient reason for disturbing the legal title.<sup>14</sup>

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ECONOMIC PRINCIPLES OF THE LAW OF WATERS. — A system of water-rights may be adapted to the economic conditions of one country and yet be entirely unsuited to the needs of another. All systems start by treating water, like air and light, as *publici juris*. In England, however, the greatest possible use of water in watercourses was not essential to prosperity, and all but riparian owners were strictly excluded from its use.<sup>1</sup> Riparian owners could use it for domestic and for certain secondary purposes such as irrigation.<sup>2</sup> But the flow of water could not be sub-

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<sup>11</sup> See cases cited in note 7, *supra*. *Contra*, *Poston v. Gillespie*, *supra*.

<sup>12</sup> *Hamilton v. Smith*, 57 Ia. 15, 10 N. W. 276; *Fennessey v. Fennessey*, 84 Ky. 519, 2 S. W. 158; *Dudley v. Dudley*, 76 Wis. 567, 45 N. W. 602; *Champlin v. Champlin*, 16 R. I. 314, 15 Atl. 85. And see for a similar doctrine in England, cases explainable on other grounds. *Hunt v. Matthews*, 1 Vern. [3d ed.] 408; *King v. Cotton*, 2 P. Wms. 674.

<sup>13</sup> See *England v. Downs*, 2 Beav. 522, 529; *Taylor v. Pugh*, 1 Hare 608, 614-615; *Williams v. Carle*, 10 N. J. Eq. 543, 550-551.

<sup>14</sup> It is conceivable that the courts, although unwilling to set aside the voluntary conveyance, might make the wife whole by giving her a correspondingly larger claim in any land retained. However, to convert such an equity into a legal right would necessitate objectionable litigation against the husband; while if allowed to remain as a mere equity it would be valueless against a purchaser without notice, while by its indefiniteness effectually preventing all alienation to one having notice.

<sup>1</sup> *Embrey v. Owen*, 6 Ex. 353; *Mason v. Hill*, 5 B. & Ad. 1.

<sup>2</sup> *Embrey v. Owen*, *supra*; *Weston v. Alden*, 8 Mass. 135; *Blanchard v. Baker*,

stantially diminished since the fundamental right was to have the water flow on as it had been accustomed.<sup>3</sup> Even to-day in England a non-riparian use can be enjoined regardless of whether or not the complainant is damaged.<sup>4</sup> Thus, by the common law, due to the over-emphasized protection of the man below, the fertilizing waters are finally poured into the sea, wasting a large possible benefit which even the limited class of riparian owners are prevented from utilizing. Such an uneconomic result is shocking from the standpoint of a community where water is precious.<sup>5</sup>

The Doctrine of Appropriation, adopted by several jurisdictions, avoids many of these uneconomic results.<sup>6</sup> It gives to the first lawful taker a right which cannot be infringed or objected to by later users, either above or below. The right is limited to the amount strictly necessary for the beneficial purpose desired. So long as this right is not interfered with, others can utilize the water.<sup>7</sup> Furthermore, the rights are transferable.<sup>8</sup> This doctrine, although admirable as insuring against waste, still endows a limited class. But this can be objected to only from a socialistic view somewhat inconsistent with property rights in general.

In jurisdictions committed to the strict doctrine of riparian rights there may still be an opportunity to make a more judicious distribution of flood water. Such water constitutes a windfall. It comes at a time of plenty and using it in new ways will deprive no one. It should not be wasted by treating it as surface water,<sup>9</sup> or as part of the watercourse. Instead, it should be subject to the use of any one having lawful access to it.<sup>10</sup> Regulation of rights in it according to the principles of appropriation would bring about the most good. The difficulty arises, however, whether flood water can be treated differently.<sup>11</sup> Many authorities

8 Greenleaf (Me.) 253. See GOULD ON WATERS, p. 385; WIEL, WATER RIGHTS IN THE WESTERN STATES, 2 ed., p. 411. See *contra*, FARNHAM, WATERS, p. 1895.

<sup>3</sup> Roberts v. Gwyrfa District Council, [1899] 1 Ch. 583.

<sup>4</sup> McCartney v. Londonderry & Loughswilly Ry. [1904] App. Cases 301; Stockport Waterworks Company v. Potter, 3 H. & C. 300. In America some cases required that damage be shown: Elliot v. Fitchburg R. Co., 10 Cush. 191; Modoc Land & Live Stock Co. v. Booth, 102 Cal. 151, 36 Pac. 431 (overruled); Kensit v. Great Eastern Ry., 27 Ch. D. 122 (overruled); WIEL, WATER RIGHTS IN THE WESTERN STATES, 2 ed., p. 495, note 22. But others hold that the non-riparian use is damage *per se*. Anaheim Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978. See WIEL, WATER RIGHTS IN THE WESTERN STATES, 2 ed., p. 499.

<sup>5</sup> See Clough v. Wing, 2 Arizona, 371, 379, 17 Pac. 453, 455.

<sup>6</sup> Willey v. Decker, 11 Wyo. 496, 73 Pac. 210; Stowell v. Johnson, 7 Utah 215, 26 Pac. 290.

<sup>7</sup> See Hunt v. Story, 64 Fed. 510, 514.

<sup>8</sup> Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. 826. See WIEL, WATER RIGHTS IN THE WESTERN STATES, 2 ed., p. 332.

<sup>9</sup> Broadbent v. Ramsbotham, 11 Ex. 602; Baulsby v. Speer, 31 N. J. L. 351.

<sup>10</sup> Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. 1054; Gallatini v. Corning Irrigation Co., 163 Cal. 405, 126 Pac. 864. See Crawford v. Hathaway, 67 Neb. 325, 373, 93 N. W. 781, 797; WIEL, WATER RIGHTS IN THE WESTERN STATES, 2 ed., p. 503; 26 HARV. L. REV. 278. The California cases have limited storm waters to "unusual floods," thus badly impairing the doctrine.

<sup>11</sup> Flood water not an integral part of the regular stream certainly lends itself to different treatment. It is an intermittent, not a regular, flow like a watercourse. Yet its appearance is regularly recurrent, not casual, as is surface water. And even if an integral part of the stream, it is an excess over the normal flow, just as much as



have dealt with flood waters according to the rules applicable to natural streams, and others have treated them as surface water. But even in those jurisdictions, in view of the great confusion in past decisions and the inevitable presence of distinguishing facts, the doctrine of *stare decisis* should prove no obstacle to a new classification.<sup>12</sup> The resulting conservation of natural resources should justify courts in confining the other classes to the waters which are clearly within them. Strangely enough one of the states where irrigation is of least importance has felt most strongly the desirability of treating flood water differently from surface water or water in a watercourse, — as evidenced by a decision that a non-riparian owner has not only a right to flood water, but also a right to have it sweep across a riparian owner's land. *Thompson v. New Haven Water Works*, 86 Atl. 585. Praiseworthy as is the feeling that inspired such a decision, the actual holding is objectionable. It subjects the riparian owner's land to a highly onerous easement that is utterly inconsistent with the common law of real property. Furthermore, the right given the plaintiff is to have the fertilizing water flow across his land. If the court is consistent and gives this right to all within the reach of the floods, none of the water can be taken out. The inevitable result is that the windfall will be wasted in the sea. The case, therefore, falls short of a satisfactory solution of the problem.

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COMPETITION AS A JUSTIFICATION OF THE SECONDARY BOYCOTT. — A. refuses to do business with B. unless B. stops dealing with C. B. complies with A.'s demand. May C. sue A.? A.'s act is admittedly tortious unless justifiable under certain limited rights.<sup>1</sup> One of these is his right to compete with others for trade or employment.<sup>2</sup> But under what circumstances does this right justify him here?

Where A. is an individual we have no authority on this question. Nevertheless, a partial answer may be ventured. The right to inflict intentional harm on another can be recognized, only because of some preponderating public benefit anticipated from its exercise, — hence its extent must be determined by what is necessary to secure this benefit. Now the objects of the right to compete are to compel every citizen to give the community his best service, to have work done by the most competent, and to secure equality of opportunity to all. None of these objects can well be attained unless the citizen is free to concentrate his efforts along lines chosen by himself, — whence it results that the right to compete includes the right to refuse to take part in any enterprise

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if it were in a different watercourse. A difficult question of fact is raised, and this has constrained many authorities to treat flood water in the watercourse in the same way as the regular stream. See WIEL, *WATER RIGHTS IN THE WESTERN STATES*, 3 ed., p. 377.

<sup>12</sup> Authorities are collected in 25 L. R. A. 531; WIEL, *WATER RIGHTS IN THE WESTERN STATES*, 3 ed., p. 375.

<sup>1</sup> *Walker v. Cronin*, 107 Mass. 555; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111. Cf. *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946. See POLLOCK, *TORTS*, 9 ed., p. 21.

<sup>2</sup> See the language of Bowen, L. J., in *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. D. 598, 613.

unless given a share large enough to suit him.<sup>3</sup> This proposition, applied to four typical cases, seems to yield results consistent with everyday practice. (1) B. wishes A., a lumber dealer and contractor, to do the entire building of a house, save for the interior woodwork, which he means to instal himself. A. refuses unless B. will buy the wood for the interior finish from him. Clearly neither B. nor any competing lumber dealer could sue. (2) Same facts, except that B. intends to employ C. to furnish and instal the interior finish. A. refuses to build unless C. will buy his lumber. C. sues. It is submitted that he can no more succeed than could B. in the case above. A.'s right to dictate his own share cannot reasonably depend on such accidents as the number of would-be participants in the enterprise. (3) Here A. refuses to build if C. is employed, unless C. uses A.'s lumber on other contracts for interior finish, or (4) unless C. joins a builder's association. In these cases C.'s discharge is desired, not in order that A.'s labor or materials may replace his, but simply to make C., or those who deal with him, less able or less willing to compete with A. in other fields.<sup>3</sup> The chances that a monopoly so created will be economically efficient are too remote to justify the injury to C., hence the justification fails.<sup>4</sup> In short, then, A. may boycott the labor or products of others only for the purpose of replacing the specific unit of labor or product boycotted with his own.

Such, it is believed, is the law where A. is an individual, or a coöperative organization forming a single business unit.<sup>5</sup> Are the rights of a mere association of mutually independent individuals the same?<sup>6</sup> Here authorities are copious, but conflicting. Certainly the combination is liable in cases like the third<sup>7</sup> and fourth<sup>8</sup> above, but as to the first<sup>9</sup>

<sup>3</sup> See discussion in *Pickett v. Walsh*, 192 Mass. 572, 583, 78 N. E. 753, 758.

<sup>4</sup> That is, the justification of competition. If a strike to force men into a union is lawful, as was argued by Holmes, J., in *Plant v. Woods*, 176 Mass. 492, 505, 57 N. E. 1011, 1016, it must be because monopoly and high prices are preferable to competition in the field of labor. An effort "to get more than one is now getting" is not of course synonymous with competition.

<sup>5</sup> As an ordinary partnership or corporation. Such a "combination" can perform services which its members acting separately could not. Hence it is to be likened to an individual, rather than to those mere aggregations of men which accomplish nothing new except to suppress internal competition. The distinction between these two sorts of combinations is probably the principal ingredient in the famous "rule of reason." See *United States v. Du Pont de Nemours*, 188 Fed. 127, 150; *United States v. Standard Oil Co.*, 221 U. S. 1, 75, 31 Sup. Ct. 502, 520.

<sup>6</sup> For *dicta* that they are the same, see *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. D. 598, 613; *Delz v. Winfree*, 80 Tex. 400, 404, 16 S. W. 111; *POLLOCK, TORTS*, 9 ed., pp. 333, 341. *Contra*, *Pickett v. Walsh*, 192 Mass. 572, 582, 78 N. E. 755, 757. *SALMOND, TORTS*, 2 ed., p. 466.

<sup>7</sup> *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Casey v. Cincinnati Typographical Union*, 45 Fed. 135; *Pickett v. Walsh*, *supra*. *Contra*, *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324. But it is not believed that the combination is here an essential element in the tort. See *Giblan v. National Amalgamated Union*, [1903] 2 K. B. 600, 619.

<sup>8</sup> *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607; *Martell v. White*, 185 Mass. 255, 69 N. E. 1085; *Plant v. Woods*, 176 Mass. 492, 56 N. E. 1011; *Purvis v. United Brotherhood*, 214 Pa. 348, 63 Atl. 585; *March v. Bricklayers' Union*, 79 Conn. 7, 63 Atl. 291. *Contra*, *Macaulay v. Tierney*, 19 R. I. 255, 33 Atl. 1. Here again the element of combination is not deemed essential.

<sup>9</sup> The following cases hold that the combination is liable. *Lucke v. Clothing Cutters' Assembly*, 77 Md. 396, 26 Atl. 505; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345.



and second <sup>10</sup> the decisions are sharply split. The following conclusions, however, are suggested as sound, and tenable on the authorities. First, the first and second cases above cannot fairly be distinguished, for the reasons already given. Secondly, the combination is usually liable in both. A. is not a unit for any purpose of serving the community, hence it cannot claim the right to compete as a unit.<sup>11</sup> The fact is that X. and Y. are demanding C.'s business for Z. Whatever the merits of this transaction, they are not those of competition.<sup>12</sup>

In a recent case a carpenter's union consistently refused to handle any lumber manufactured in an "open shop." Plaintiff, an "open shop" manufacturer, sought to enjoin this boycott so far as it affected his product. Relief was denied. *Paine Lumber Co., Ltd., v. Neal*, 50 N. Y. L. J. 1497 (U. S. D. C., So. Dist. of N. Y., November, 1913). The decision, though inconsistent with the views here expressed, is in accord with prior New York cases, since the facts are those of the second supposed case, in which A., even though a combination, is held justified in New York.<sup>13</sup> But the court's reason, namely, that a boycott directed indiscriminately against all persons of a class is a public wrong, to be enjoined only at the suit of the state, is unsound. Public property rights, like the right to travel on the roads, cannot, indeed, be vindicated by private persons; but where the right infringed is vested in the plaintiff individually, he may sue to protect it, no matter how many other citizens may be deprived of the same right by the defendant's act.<sup>14</sup> The right to engage in business is of the latter class.<sup>15</sup> There seems to be no warrant for putting this new obstacle in the path of those seeking to escape the oppression of "organized" labor or capital.

*Contra*, National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369; Pickett v. Walsh, *supra*; Scottish Co-operative Society, Ltd., v. Glasgow Fishers' Association, 35 Scot. L. Rep. 645. Cf. Mogul S. S. Co. v. McGregor, [1892] A. C. 25.

<sup>10</sup> The following cases hold that the combination is liable. Quinn v. Leathem, [1901] A. C. 495; Lyons v. Wilkins, [1896] 1 Ch. 811. *Contra*, Pickett v. Walsh, *supra*; National Fireproofing Co. v. Mason Builders' Association, 169 Fed. 259.

<sup>11</sup> This fact alone suffices to answer the argument that because some individuals are more powerful than some combinations, therefore individuals and combinations should be treated alike. That argument is still further weakened by the fact that an individual can seldom make his services indispensable without subjecting himself to the public service law. *Inter-Ocean Publishing Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822.

<sup>12</sup> Here again it is necessary to notice a modern tendency to hold that the social interest justifies restraints on competition among laborers for certain purposes. *National Protective Association v. Cumming*, 170 N. Y. 315, 323, 63 N. E. 369, 370; *National Fireproofing Co. v. Mason Builders' Association*, 169 Fed. 259, 268. Properly understood, these decisions restrict, rather than extend, the right of competition.

<sup>13</sup> *National Protective Association v. Cumming*, *supra*; *National Fireproofing Co. v. Mason Builders' Association*, *supra*.

<sup>14</sup> *Wesson v. Washburn Iron Co.*, 95 Mass. 95; *King v. Morris & Essex R. R. Co.*, 18 N. J. Eq. 397.

<sup>15</sup> This is shown by the fact that it is "property" protected by the Constitution. *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427. The right to use the roads is not so protected. *Stanwood v. Malden*, 157 Mass. 17, 31 N. E. 702; *Kings Co. Fire Ins. Co. v. Stevens*, 101 N. Y. 411, 5 N. E. 353. See 2 ELLIOTT, ROADS AND STREETS, §§ 1172, 1180, 1181.

## RECENT CASES.

**AGENCY — NATURE AND INCIDENTS OF 'RELATION — KNOWLEDGE OF AGENT: WHEN IMPUTED TO PRINCIPAL.** — The president of a bank secured by fraud a promissory note from the maker, which he indorsed for value to the bank, acting both as indorser and as agent for the bank. The bank sues the maker, who claims that the bank was affected, through its agent, with notice of the fraud. *Held*, that the bank may not recover. *First Nat. Bank v. Burns*, 103 N. E. 93 (Ohio).

To the general rule that the knowledge of the agent within the scope of employment is the knowledge of the principal, an exception is made where it would be against the agent's interest to communicate such knowledge. *Frenkel v. Hudson*, 82 Ala. 158; *Innerarity v. Merchants' National Bank*, 139 Mass. 332. See *MECHEM, AGENCY*, § 723. The theory is that the general rule rests on the presumption that the agent has communicated his knowledge to the principal; it does therefore not apply where it is clear that the agent will not in fact inform the principal. See *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 486. Another ground for the general rule is the identification of principal and agent. See *Mountford v. Scott*, 3 Madd. 34, 40; *Houseman v. Girard Building Ass'n*, 81 Pa. St. 256, 262. On this view there is no basis for such an exception, for knowledge would be implied in all cases. Each theory seems but a fictitious explanation of a rule of policy, that one who deals through agents is bound by notice that they have acquired. It seems fair, on this basis, to make an exception where the agent is acting for his own adverse interests. The principal case denies any such exception. The court, however, makes the distinction that where the agent is the sole party in the transaction, his knowledge will be imputed to the principal, in spite of his adverse interest. *Newell v. Hadley*, 206 Mass. 335, 92 N. E. 507. *Contra*, *National Bank of Nephi v. Foote*, 12 Utah 157, 42 Pac. 205. As a sub-exception, this distinction seems to be based on a sound policy, that a principal should not be regarded as a purchaser without notice, when he must rely on the act of the very agent who knew. The result may further be supported on the theory that the agent has really confederated in a tort on the defendant, and that the principal cannot claim the benefit of the wrongful act without accepting the responsibility for it as well. The principal case therefore reaches a correct result, it is submitted.

**BANKRUPTCY — PREFERENCES — STATUTES REQUIRING RECORDING OF TRANSFERS.** — More than four months before bankruptcy an insolvent transferred property to the appellant, which the latter could reasonably have known would result in a preference. The transfer was by deed, which was recorded less than four months before the filing of the petition. By the law of Ohio the unrecorded deed was valid except as to subsequent purchasers in good faith. The trustee in bankruptcy now seeks to avoid the transfer as a preference. *Held*, that the deed may be set aside. *Carey v. Donohue*, 31 Am. B. Rep. 210 (C. C. A., 6th Circ.).

Section 60, a, of the National Bankruptcy Law provides that "where a preference consists of a transfer, such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required." This provision was added in 1903 for the purpose of changing the rule by which the date of such a preferential transfer was held to take effect from delivery of the deed. See *COLLIER ON BANKRUPTCY*, 8 ed., 654. Such a rule made it possible for a creditor to conceal his preference for the four months and record his deed just before bankruptcy. Unlike § 3, b,



of the act, the provision in § 60, a, is effective only when recording is required, not when it is "permitted or required." This may mean one of three things. First, that the clause is operative only when recording is necessary to make the transaction valid between the parties. See *In re Hunt*, 139 Fed. 283, 286. The amendment is then ineffective. Or the meaning may be that "required" is equivalent to "required as against creditors." Several cases have gone this far, putting the trustee in the shoes of the creditors. *Loeser v. Savings, etc. Co.*, 148 Fed. 975. *In re Montague*, 143 Fed. 428. See 20 HARV. L. REV. 645. Both of the above interpretations proceed upon the theory that for recording to be required within the meaning of the statute it must be required as against those persons the trustee represents. But there is nothing whatever in the language of § 60, a, which would limit its operation to transfers of this kind. The interpretation adopted by the court in the principal case, that the clause includes transfers where for any purpose recording is required, seems more desirable. The purpose of this section of the amendment is to make more uniform the rule for avoiding preferences. Since the state statutes vary greatly as to the class of persons against whom record is required, it does not make for uniformity for that factor to determine whether there has been a preference. Nor is the view contended for without the support of authority. *In re Beckhaus*, 177 Fed. 141; *English v. Ross*, 140 Fed. 630. *Contra, Meyer Bros. v. Pipkin Drug Co.*, 136 Fed. 306. It is to be hoped that the Supreme Court will adopt this, rather than follow out its former view that the trustee's right to avoid a recorded transfer depends both upon his status and the peculiarities of the state statutes. *York, etc. Mfg. Co. v. Cassell*, 201 U. S. 344.

**BANKRUPTCY — PROVABLE CLAIMS — CLAIMS UNDER EXECUTORY CONTRACTS.** — The Auditorium Hotel entered into a five-year contract granting to a transfer company, in consideration of a certain monthly sum, their exclusive baggage and livery privilege. Soon after, the transfer company became bankrupt, and the hotel now claims to prove for damages against the estate. *Held*, that the bankruptcy is an anticipatory breach of the contract and that proof of the claim will be allowed. *In re Scott Transfer Co.*, Circuit Court of Appeals, Seventh Circuit, October Term, 1913.

For a discussion of the principles involved in this case, see NOTES, p. 469.

**CARRIERS — BAGGAGE — UNACCOMPANIED BY OWNER.** — The plaintiff bought a ticket on the defendant's line and, although she did not become a passenger herself, used it to send baggage, which was lost. *Held*, that the plaintiff may recover. *Alabama Great Southern R. Co. v. Knox*, 63 So. 538 (Ala.).

What authority there is, is contrary to this decision. *Marshall v. Pontiac R. Co.*, 126 Mich. 45, 85 N. W. 242; *Southern Ry. Co. v. Dinkins*, 139 Ga. 332, 77 S. E. 147. The reasoning of these latter cases, it is submitted, is correct. The railroad has held itself out as a carrier of passengers only, and it is solely as a reasonable incident of passenger carriage that baggage carriage may be required at all. The right to transportation of baggage is not one of two coordinate privileges sold together for a single price. Indeed, the essential element in creating carrier's liability for baggage is apparently delivery to the railroad with intent to become a passenger. *Wood v. Maine Central R. Co.*, 98 Me. 98, 56 Atl. 457, commented on in 17 HARV. L. REV. 354; *Beers v. Boston & Albany R. Co.*, 67 Conn. 417, 34 Atl. 541, criticized in 10 HARV. L. REV. 186. It has even been suggested that if the contemplated journey is never taken the carrier be relieved of responsibility *ab initio*. See WYMAN, PUBLIC SERVICE CORPORATIONS, § 728. This seems fair where no ticket was ever purchased. But it would not seem reasonable to enforce it against a plaintiff who, having purchased a ticket with the *bonâ fide* intention of making the trip, was prevented from going by circumstances arising subsequent to checking the baggage.

However, since he has taken advantage of one incident of the unit of service it would seem that he could not use the ticket for a later journey. But a passenger should not be required to travel on the same train with the baggage. *McKibbin v. Wisconsin Central R. Co.*, 100 Minn. 270, 110 N. W. 964; see 20 HARV. L. REV. 647; *Larned v. Central R. Co.*, 81 N. J. L. 571, 79 Atl. 289; *Moffat v. Long Island R. Co.*, 123 N. Y. App. Div. 719, 107 N. Y. Supp. 1113. Although the old view was *contra*. *Collins v. Boston & Maine R.*, 10 Cush. (Mass.) 506; *Wilson v. Grand Trunk Ry.*, 56 Me. 60. In breaking away from this rule, the principal case, it is submitted, has gone too far. The proper restriction would seem to be that the trip take place within such a space of time after checking the baggage as to indicate that both relate to the same journey. See *Southern Ry. Co. v. Dinkins*, *supra*. The reasoning of the principal case, that the plaintiff has purchased two rights with the ticket, cannot be reconciled with the above principles. Also, the court's admission here that the plaintiff must, technically at least, have intended to become a passenger, seems inconsistent with its other reasoning.

**CARRIERS — PASSENGERS — FAILURE TO TRANSPORT TO DESTINATION.** — A passenger on the appellant's train paid his fare to a flag station and notified the conductor of his desire to be set down there. The train stopped about a mile before reaching the station, and upon being directed by the conductor that it was his station, the passenger alighted. The passenger sues for injuries due to his being compelled to walk to his destination. *Held*, that he may recover without regard to the defendant's negligence. *Beaumont, S. L. & W. Ry. Co. v. Bishop*, 160 S. W. 975 (Tex. Civ. App.).

The contract of a railroad with a passenger is not as absolute and unconditional as the reasoning of the court in the principal case would indicate. It is not liable for delay in transportation not due to its negligence. *Gordon v. Manchester & Lawrence R. Co.*, 52 N. H. 596; *Cormack v. New York, N. H. & H. R. Co.*, 196 N. Y. 442, 90 N. E. 56; *Southern Ry. Co. v. Miller*, 129 Ky. 98, 110 S. W. 351. But see *Renfro v. Texas C. Ry. Co.*, 141 S. W. 820 (Tex. Civ. App.). Nor is it absolutely liable for the safety of the passenger. *Readhead v. Midland Ry. Co.*, 2 Q. B. 412, 4 Q. B. 379; *Glennen v. Boston Elevated Ry.*, 207 Mass. 497, 498, 93 N. E. 700, 701. It is bound only to exercise the utmost diligence, consistent with its duties as a common carrier, to transport the passenger promptly and safely to his destination and give him a reasonable opportunity to alight. The passenger must use due diligence to inform himself of the places and times for entering and alighting from trains, and the carrier is under no obligation to inform him personally of his arrival at his destination, or to see that he alights. *Southern Ry. Co. v. O'Bryan*, 115 Ga. 659, 42 S. E. 42; *Southern R. R. Co. v. Kendrick*, 40 Miss. 374. Probably by universal practise the railroads have assumed the duty of giving a general announcement of approach to stations. See *Southern R. R. Co. v. Kendrick*, *supra*, 385; *Southern Ry. Co. v. Hobbs*, 118 Ga. 227, 231, 45 S. E. 23, 24. At all events, where the carrier through its authorized agents has undertaken in a particular case to direct the passenger, it will be liable for all delay, expense, or injury proximately resulting from any misdirection. *Louisville, N. A. & C. Ry. v. Hosapple*, 12 Ind. App. 301, 38 N. E. 1107; *Louisville & N. R. R. Co. v. Jenkins*, 15 Ky. L. R. 239; *Tennessee C. R. Co. v. Brasher's Guardian*, 29 Ky. L. R. 1277, 97 S. W. 349.

**CONFLICT OF LAWS — RECOGNITION OF FOREIGN JUDGMENT — CITIZENSHIP AS A GROUND FOR PERSONAL JURISDICTION.** — The plaintiff, through service by publication, secured a judgment in a Bavarian court against the defendant, a Bavarian subject, who throughout the proceedings was domiciled in New York. The defendant had filed his intention of becoming a United States citizen, but



the judgment was secured before naturalization. *Held*, that the foreign judgment is not enforceable. *Grubel v. Nassauer*, 210 N. Y. 149.

For a discussion of this case and the principles involved, see NOTES, p. 464.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHTS UNDER THE FOURTEENTH AMENDMENT. — The defendant was indicted under a statute which provided that whoever should agree to lease any building, knowing, or with good reason to know, that it was intended to be used as a house of ill-fame, or whoever should, knowingly, or with good reason to know, permit the building to be so used, should be guilty of a misdemeanor. A second statute provided that two convictions in the same house within six months would satisfy the requirement that the house had been so used with the permission of the owner. This was the only evidence of knowledge in the principal case. A writ of *habeas corpus* is brought to secure the relator's release. *Held*, that the relator be discharged, the second statute being unconstitutional. *People v. Warden of City Prison*, 143 N. Y. Supp. 912 (Sup. Ct.).

One who leases a house with knowledge that it is to be used as a disorderly house, or who permits it to be so used, is guilty of a misdemeanor at common law. *People v. Erwin*, 4 Den. (N. Y.) 129. *Contra*, *Reg. v. Stannard*, L. & C. 349. A disorderly house is a common-law nuisance. *Price v. State*, 96 Ala. 1, 11 So. 128. Therefore no *mens rea* need be shown. *Reg. v. Stephens*, L. R. 1 Q. B. 702. The element of knowledge is, however, necessary. See *State v. Williams*, 30 N. J. L. 102, 106. The lessor has to be connected in some way as a principal in the misdemeanor, since mere ownership of the property imposes no responsibility for the nuisance. *Schmidt v. Cook*, 4 Misc. (N. Y.) 85, 23 N. Y. Supp. 799. The first statute is, except for the punishment provided, declaratory of the common law. The second statute, in terms, precludes the defendant from denying his connection with the crime on the score of knowledge. Such a conclusive presumption has been held unconstitutional. *Groesbeck v. Seeley*, 13 Mich. 329. More probably the intent was to make knowledge unnecessary. The first statute also gave the owner a right to oust a once-convicted tenant. This puts a duty on him to enforce that right. Failing to do so before a second conviction, he has violated the statute. The maximum penalty provided is a five hundred dollars fine, or one year's imprisonment, or both. PENAL LAW, 1909, § 1937. To punish thus a morally guiltless defendant savors of a deprivation without due process of law. Yet the police power has often been extended equally far in the interest of public health and morals. *People v. West*, 106 N. Y. 293, 12 N. E. 610; *Ford v. State*, 85 Md. 465, 37 Atl. 172; *Ah Sin v. Wittman*, 198 U. S. 500.

CONSTITUTIONAL LAW — PERSONAL RIGHTS, CIVIL, POLITICAL, AND RELIGIOUS — OPERATION TO PREVENT PROCREATION. — THE BOARD of Examiners of Feeble-Minded, Epileptics, Criminals, and other Defectives, to prevent procreation, ordered the operation of salpingectomy on the plaintiff, a woman confined in a charitable institution for epileptics. A statute provided for the asexualization of feeble-minded, epileptics, rapists, certain criminals and other defectives who were confined in state reformatories, charitable, and penal institutions. *Held*, that the portion of the statute relating to epileptics is unconstitutional because, not applying equally to all epileptics within the state, it does not afford equal protection of the laws. *Smith v. Board of Examiners*, 88 Atl. 963 (N. J. Sup. Ct.).

Aside from this apparently impregnable position, the opinion contains a strong *dictum* on the broader ground that statutes of this nature are invalid under the "due process of law" clause as an unreasonable exercise of police power. The case is interesting to compare with *State v. Feilen*, 126 Pac. 75 (Wash.), discussed in 26 HARV. L. REV. 163. There the question arose under

circumstances most favorable to the right of the state — the operation being vasectomy (the surgical sterilization of a male, relatively a very simple affair), to be performed on a man convicted of a sexual crime — the only constitutional difficulty being the prohibition against “cruel and unusual punishment.” Here the operation was a serious one, although the simplest method of asexualizing a woman, and the question is raised as to the suppression of the rights of the individual for the artificial enhancement of the public welfare. Since this New Jersey statute expressly provided that the fact that it is held unconstitutional in regard to a single class shall not invalidate the act as a whole, the court may yet be given an opportunity to express itself on the criminal portion of the statute. Statutes similar to that in the principal case have been enacted in Indiana, Iowa, California, Washington, Connecticut, New York, Utah and Michigan. In Vermont such a bill was vetoed. But they have not been passed upon by the courts except in these two states. For a general discussion of the whole question see 27 *Medico-Legal Journal*, 134, in which such statutes are advocated; and 4 *Journ. Crim. Law*, 326, where they are strongly disapproved. See also MOSBY, *CRIME*, 111.

CONSTITUTIONAL LAW — POWER OF EXECUTIVE — PRESERVATION OF NEUTRALITY BY INTERNMENT. — Mexican soldiers belonging to the Federalist forces, having been put to flight, crossed the boundary into the United States. They surrendered to the United States army, and by order of the President were disarmed and interned. They now petition for a writ of *habeas corpus*. Held, that the writ be denied, no provision of the Constitution of the United States having been violated. *Ex parte Toscano*, 208 Fed. 938 (Dist. Ct., S. D. Cal.).

It is clear that aliens fall under the protection of the “due process” clause. *Wong Wing v. United States*, 163 U. S. 228. By an express provision of the Convention of The Hague, belligerent troops which are received by a neutral power are to be interned. 36 U. S. STAT. AT LARGE, 2324. The principles governing the status of neutrality are old. See 2 WESTLAKE, *INT. LAW*, 169. They are as necessary a part of sovereignty as the war power, and the federal government from the first has enforced them. *The Santissima Trinidad*, 1 Brock. (U. S. Circ. Ct.) 478, 488, 496. See 1 *AMER. STATE PAPERS*, 69, *et seq.*; 7 MOORE, *DIG. INT. LAW*, 1002, *et seq.*; 8 *AMER. JOURN. INT. LAW*, 1. The provision of the treaty is merely declaratory. The admittance of foreign troops into the territory is a matter of grace. See *The Schooner Exchange v. McFadden*, 7 Cranch (U. S.) 116, 139. It is granted under the circumstances of the principal case for reasons of humanity. See HALL, *INT. LAW*, 625. But having permitted the entrance, the nation could not allow the belligerents to leave without a violation of neutrality. 2 HALLECK, *INT. LAW*, 173. This internment, as well as the decision whether there is a state of belligerency, properly falls within the executive functions without the interposition of the judiciary. If a crime were charged a judicial trial would be necessary. *Wong Wing v. United States*, *supra*, 236. Here, however, such is not the case. There is no violation of the neutrality laws. Thus the case differs from *Ex parte Orozco*, 201 Fed. 106. See 7 MOORE, *DIG. INT. LAW*, 1018, *et seq.* 1026. The jurisdiction of the executive here is based on the exigencies of government. See 27 *POL. SC. QUART.* 215, 238. The restraint of liberty is necessary, first, to preserve peace internally; second, to prevent the nation from being involved in a foreign war. Liberty may also be restrained by the executive officers acting alone in the analogous case of the detention and exclusion of aliens. See *Wong Wing v. United States*, *supra*, 231. See also 22 *HARV. L. REV.* 221, 360. So, too, by boards of health in passing on questions of quarantine and enforcing their decisions. *Valentine v. Englewood*, 76 N. J. L. 509, 71 *Atl.* 344. In the principal case, therefore, there seems to have been a proper exercise of the executive power in the enforcement of a declaratory treaty.



**CORPORATIONS — REORGANIZATION AND CONSOLIDATION — SALE OF ASSETS UNDER CONSENT DECREE OF COURT — IS VALUE SET BY DECREE BINDING ON SURETIES WHEN CREDITORS TAKE OVER ASSETS.** — The creditors of an insolvent corporation, with the knowledge and consent of the surety, took over the assets under a consent decree of court as a step in a plan of reorganization. They formed a new corporation to take the assets and issued paid-up capital stock equal in par value to more than the amount of their claims against the old insolvent corporation. The creditors asserted the right to apply to their claims only the value as set by the decree and to hold the sureties for the balance. *Held*, that the creditors were estopped by the issue of paid-up capital stock to assert that the assets were worth less than the full amount of their claims. *Mechanics & Metals Nat. Bank v. Howell*, 207 Fed. 973. See NOTES, p. 467.

**DOMICILE — ACQUIRING OF DOMICILE BY MILITARY MEN — POSSIBILITY OF DOMICILE IN FEDERAL TERRITORY.** — The deceased, who had acquired a domicile of choice in New York, became an officer in the regular army, and served in Texas, at Governor's Island, in Chicago, and again at Governor's Island, where his headquarters were at the time of his death. He intended to live in the District of Columbia after leaving Governor's Island. *Held*, that his residence in federal territory, Governor's Island, coupled with his intention to continue to live in federal territory, the District of Columbia, gave him a domicile of choice in federal territory, so that his estate was not subject to the New York transfer tax. *Matter of Grant*, 83 N. Y. Misc. 257.

The portions of territory, such as Governor's Island, over which the United States exercises exclusive control, are nevertheless portions of the legal units, the states, in which they lie. The decision therefore seems erroneous. See NOTES, p. 472.

**EMINENT DOMAIN — RESTRICTIONS UPON PROPERTY ADJACENT TO PUBLIC PARKS.** — A Pennsylvania statute conferred upon cities the power to purchase private property within two hundred feet of public parks and parkways, and "to resell . . . with such restrictions in regard to the use thereof as will fairly insure the protection of such . . . parks . . . , their environs, the preservation of the view, appearance, light, air, health, and usefulness." ACT, June 8, 1907 (P. L. 466). In pursuance thereof, the councils of the defendant city passed an ordinance appropriating the plaintiff's property, and authorized its resale to B. subject to restrictions. *Held*, that the statute is unconstitutional. *Pennsylvania Mutual Life Ins. Co. v. City of Philadelphia*, 88 Atl. 904 (Pa.)

The right of eminent domain may be invoked only for a public use. *Embury v. Conner*, 3 N. Y. 511; *Gaylord v. Sanitary District of Chicago*, 204 Ill. 576, 68 N. E. 522. But as to what is a public use the courts are not agreed. One line of decisions makes the phrase synonymous with "general utility," "public advantage or benefit." *Olmstead v. Camp*, 33 Conn. 532. See *Tuttle v. Moore*, 3 Ind. Ter. 712, 725, 64 S. W. 585, 591; see 15 HARV. L. REV. 399. Another, and closer, interpretation, and one to which the principal case subscribes, requires that there be a "use or right of use by the public." *Matter of the Application of the Eureka Basin Warehouse and Manufacturing Co.*, 96 N. Y. 42; *Arnsperger v. Crawford*, 101 Md. 247, 253, 61 Atl. 413, 415. See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 258. All this is involved in the question which the principal case suggests as to how building restrictions for æsthetic purposes can be imposed upon property surrounding public parks. The simplest method would be to make a direct limitation upon the present owners. Whether this could be justified as an exercise of the police power is at least doubtful. *Passaic v. Paterson Bill Posting Co.*, 72 N. J. L. 285, 62 Atl. 267; *People v. Green*, 85 N. Y. App. Div. 400, 83 N. Y. Supp. 460. See 20 HARV.

L. REV. 35. But the right to take land by eminent domain includes the taking of a limited interest in property in the nature of an easement. *Pacific Postal Telegraph-Cable Co. v. Oregon, etc. R. Co.*, 163 Fed. 967. See *Attorney-General v. Williams*, 174 Mass. 476, 55 N. E. 77, 178 Mass. 330, 59 N. E. 812; *Williams v. Parker*, 188 U. S. 491, 23 Sup. Ct. 440. And this might be under either theory of public use. A second plan would be for the state to purchase and retain the fee of the surrounding property; a third, for the state to resell subject to restrictions. Either of these would be within the broader interpretation of public use. But under the stricter view, there would be the difficulty of proving a sufficient public user beyond mere public advantage. Where the state retains the fee, it might be a close case. But where the right retained is solely in the nature of an easement, the method would be unconstitutional.

EVIDENCE — HEARSAY: IN GENERAL — ADMISSIBILITY OF DECLARATIONS ON QUESTIONS OF IDENTIFICATION. — At a trial for murder, in order to identify the defendant as the guilty party, the prosecution offered in evidence a declaration of the victim, in which he pointed out the accused and identified him as the assailant. The statement was not shown to be a dying declaration. *Held*, that the evidence is admissible. *State v. Findling*, 144 N. W. 142 (Minn.).

The court assumes a general relaxation of the rules of evidence on questions of identification. In a few respects this appears to be true. Thus the opinion rule does not exclude the opinions of properly informed witnesses concerning the identity of a person. *Craig v. State*, 171 Ind. 317, 86 N. E. 397; *State v. Powers*, 130 Mo. 475, 32 S. W. 984. Leading questions are also allowed with greater freedom. *Rex v. Watson*, 2 Stark. 116, 128. But see *Rex v. Dickman*, 5 Cr. App. R. 135, 142. These minor variations, however, scarcely sustain the broad ground taken by the court. An unsworn identification, by declaration alone or with gesture, presents all the elements of hearsay, and is therefore inadmissible by the weight of authority. *O'Toole v. State*, 105 Wis. 18, 80 N. W. 915; *State v. Houghton*, 43 Ore. 125, 71 Pac. 982. Some courts admit the declaration as part of the *res gesta*, on the ground that it accompanies and explains the material act of pointing out the accused. *Lander v. People*, 104 Ill. 248. Such a view, however, ignores the hearsay quality of the gesture itself, and virtually makes an accompanying gesture the only requisite for the admissibility of any declaration. The mere recognition of the defendant by the victim might possibly have enough probative value on the issue of identification to render it admissible as an expression of a material mental state. See *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285; *Jacobs v. Whitcomb*, 10 Cush. (Mass.) 255. But this exception to the hearsay rule would not cover the accompanying descriptive declaration. *State v. Egbert*, 125 Ia. 443, 101 N. W. 191; *Clark v. State*, 39 Tex. Cr. R. 152, 45 S. W. 696. A different situation arises, of course, when a former identification is used to supplement a witness's recollection. *Regina v. Burke*, 2 Cox C. C. 295. And the hearsay rule would not affect the admissibility of the previous declaration to support an impeached witness. See *Murphy v. State*, 41 Tex. Cr. R. 120, 51 S. W. 940. See also 2 WIGMORE, EVIDENCE, § 1130. But the principal case seems difficult to support.

FALSE IMPRISONMENT — ARREST WITHOUT WARRANT WHERE CRIME CHARGED NOT COMMITTED. — A bookseller having suffered repeated losses, and reasonably believing a certain clerk to be guilty of the thefts, caused him to be arrested without a warrant and prosecuted, on the charge of having stolen a particular book. This book had not in fact been stolen. *Held*, that the bookseller, though not liable for malicious prosecution, is liable for false imprisonment. *Walters v. Smith*, 30 T. L. Rep. 158.



There is a sharp distinction between malicious prosecution and false imprisonment. See SALMOND, TORTS, 2 ed., 351. In the former, malice and lack of probable cause must be shown. *Abrath v. N. E. Ry. Co.*, 11 Q. B. D. 440. In the latter, even honest mistake is in general no defense. See *Lock v. Ashton*, 12 Q. B. 871. The defendant in this case having probable cause is not liable for malicious prosecution. However, an arrest on suspicion of felony without warrant is *prima facie* wrongful, and must be justified by showing authority to act, and reasonable action. A constable, having authority to act by virtue of his office, need only show that he acted reasonably. *Beckwith v. Philby*, 6 B. & C. 635. A private citizen has such authority only when a felony has in fact been committed. See 2 HALE P. C. 78; *Siegel Cooper Co. v. Connor*, 70 Ill. App. 116. In the principal case, the plaintiff's arrest for the crimes committed would then have been justified. But unless a party acts in reliance upon a justification, it cannot be set up. *Regina v. Dadson*, 4 Cox C. C. 358. It would seem to follow that the defendant can justify only by proving the crime charged; and that failing in this, he is liable for false imprisonment.

**FALSE IMPRISONMENT — CIVIL LIABILITY OF MINE OWNER FOR FAILING TO BRING EMPLOYEES UP FROM MINE.** — The plaintiff, employed in the defendant's mine, in breach of his contract, quit work at noon, and the defendant refused to bring the plaintiff to the surface, although notified of his desire to leave the mine. The plaintiff brought an action for false imprisonment. *Held*, that the plaintiff cannot recover. *Herd v. Weardale Steel, C. & C. Co.*, [1913] 3 K. B. 771.

The principal case proceeds on the ground that there was no act of imprisonment. The omission to bring the plaintiff up from the mine cannot be so linked with the previous act of letting him down as to constitute a single act of imprisonment; for the acts of commission and omission are too far apart in time and nature to be conceived of as one. *Hill v. Caverly*, 7 N. H. 215. Nor is the defendant's position analogous to that of a locomotive engineer, whose omission to exercise control over the moving force is substantially a misfeasance. See *Kelly v. Metropolitan Ry. Co.*, [1895] 1 Q. B. 944. A jailer, confining his prisoner longer than his legal sentence, has been held liable for false imprisonment. *Withers v. Henley*, Cro. Jac. 379; *Mee v. Cruikshank*, 86 L. T. Rep. N. S. 708. But practically the prison routine must cause the jailer to commit new misfeasances. Furthermore, in the principal case the prior act of lowering was not tortious because of the plaintiff's consent. See *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089. Thus the court seems clearly correct in holding that there was no false imprisonment.

The facts suggest the possibility of working out a relational duty on the part of the defendant to bring his employee to the surface. It has been held that a railroad company, having sent a gang of men to an isolated region in very cold weather, was bound to transport them to some point where they could get food and shelter. *Shoemaker v. St. Paul & Duluth Ry. Co.*, 46 Minn. 39, 48 N. W. 559. Recovery has also been allowed where the superintendent of a coal mine failed to take proper measures to save the lives of miners caught in the mine when a fire had accidentally broken out. *Bessemer Land & Improvement Co. v. Campbell*, 121 Ala. 50, 25 So. 793. In the principal case, the plaintiff, by the nature of his employment, was placed in a situation where his personal liberty was dependent on a means of exit within the defendant's exclusive control. It is possible to argue that not only the interest of personal safety but that of personal liberty should be secured by this relational duty of the master. On this supposition it would follow, from the cases cited, that a duty existed to bring the plaintiff up from the mine. Although the contract relation between the parties is at an end, as long as the dependent situation created by the employment exists, the employer must perform his relational duties.

*Packet Co. v. McCue*, 17 Wall. (U. S.) 508. For this reason the fact that the plaintiff had broken his contract is not here material. In any event such an employee could only demand to be taken up when reasonably convenient, in view of other mine operations—but this was the fact in the principal case.

**ILLEGAL CONTRACTS — EFFECT OF ILLEGALITY — DEFENSE TO PURCHASER UNDER CONTRACT FOR ILLEGAL SALE.** — The defendant agreed to buy “renovated” butter of the plaintiff, under a contract calling for a series of shipments. The evidence justified the inference that title would pass outside the jurisdiction at the time of shipment. After accepting and paying for several consignments, the defendant refused to receive any further deliveries. In an action on the contract, the defendant set up the failure of the plaintiff to mark his shipments in compliance with a local statute providing that “No person, etc., shall manufacture, sell, or offer for sale, or have in his possession with intent to sell butter known as process butter, unless the package in which it is sold is marked ‘renovated butter.’ All process butter shipped from other states shall be subject to the same regulations.” (2 REM. & BAL. WASH. CODE, § 5447 c.) *Held*, that the plaintiff may recover in spite of the statute. *Armour & Co. v. Jesmer*, 136 Pac. 689 (Wash.).

The result is unimpeachable on the facts of the case. The contract would be performed in a jurisdiction beyond the operation of the statute. *Braunn v. Keally*, 146 Pa. 519, 23 Atl. 389. The statute makes illegal the selling and the possession with intent to sell, but says nothing as to a shipment into the state in pursuance of a sale. But, if the court is correct in assuming that the shipment of misbranded butter would be covered by the statute, it would seem that the plaintiff should not recover. There would have been no recovery for the price if the sale had been effected in the unlawful manner. *Forster v. Taylor*, 5 B. & Ad. 887; *Pray v. Burbank*, 10 N. H. 377. And the previous method of shipment overcomes the presumption that he would choose the lawful course sufficiently to justify the defendant in refusing to proceed. But the court reasons that the defendant may not have the benefit of this defense as to that portion of the contract which remained executory, because notice was not given in time to enable the plaintiff to perform lawfully. If the defense proceeded on the idea of relief to the defendant, this position would be tenable. But a defense constituted primarily for the benefit of the public is not forfeited in this way. See *Church v. Proctor*, 66 Fed. 240, 244. It is therefore submitted that if the statute covered the matter, the defendant was under no duty to receive the goods for the refusal of which action was brought. *Buxton v. Hamble*, 32 Me. 448. See *Gallini v. Laborie*, 5 Durnf. & East 242.

**INTERNATIONAL LAW — LEGATIONS AND DIPLOMATIC AGENTS — IMMUNITY OF DIPLOMATIC AGENTS FROM SUITS: WHETHER WAIVED BY UNCONDITIONAL APPEARANCE.** — The defendant, an attaché of a foreign legation in England, had entered an unconditional appearance in a civil action regarding an undertaking in his private capacity. It did not appear that the defendant knew of his privilege of exemption from suit. *Held*, that the privilege was not waived by appearing. *In re Republic of Bolivia Exploration Syndicate*, 30 T. L. Rep. 78 (Ch. Div., Nov. 12, 1913).

It has long been a settled rule of law that foreign diplomatic representatives are exempt from all local processes in the country to which they are accredited. 1 KENT'S COMMENTARIES, 15, 38. The same immunity is given not only to an ambassador himself, but to his subordinates, family, and servants as well. See *Respublica v. De Longchamps*, 1 Dall. (Pa.) 120, 125; 1 HALLECK, INTERNATIONAL LAW, 354. It extends so far that the local law does not punish the ambassador, even when he conspires against the sovereign to whom he is accredited. See 1 WESTLAKE ON INTERNATIONAL LAW, 266. Whether or not



a violation of duty to the sovereign who sends him, participation in business ventures outside the official duty does not render the envoy liable to civil suit. *Magdalena, etc. Co. v. Martin*, 2 E. & E. 94. The court in the principal case found that the defendant had not waived his immunity as a foreign diplomat, raising, but not squarely deciding, the interesting point whether or not he could have waived it. That an unconditional appearance does constitute a waiver seems to be the decision in *Taylor v. Best*, 14 C. B. 487. (But see the *dictum* apparently *contra* in *Barbuil's Case*, Cas. t. Talb. 281, 282.) See also 1 RIVIER, PRINCIPES DU DROIT DES GENS, 495, 496. It is submitted, however, that there should be no waiver, express or implied, without permission of the envoy's sovereign. It is the sovereign's business that the representative is sent abroad to do. One purpose of the privilege is that the business shall not be interfered with by local restrictions. See *Barbuil's Case*, *supra*, 282. Furthermore, it would also hazard a sovereign's dignity if his ambassador, even through his own volition, could place himself under temporary allegiance to a foreign power. See *Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.) 116, 138. The ambassador should not be allowed to waive the privilege which attaches to the office, rather than to him as a person. Such waiver is forbidden American diplomats. See 4 MOORE'S INT. LAW DIGEST, 631. French authority supports the view suggested. *Dalloz*, 1907, 2: 281. See DESPAGNET, DROIT INTERNATIONAL PUBLIC, 3 ed., 258. There are *dicta* of American courts to the same effect. See *United States v. Benner*, 24 Fed. Cas. 1084, 1087; *Valarino v. Thompson*, 7 N. Y. 576, 579.

JUDGMENTS — OPERATION AS BAR TO OTHER ACTIONS — JUDGMENT FOR DAMAGES TO PERSON AS BAR TO RECOVERY FOR DAMAGE TO PROPERTY. — By a contract of insurance, the owner of an automobile had agreed to assign to the plaintiff all rights for damage thereto. Both the automobile and the owner were injured by the same negligent act of the defendant. The owner having recovered damages for the injury to his person, the insurance company now sues for the injury to the automobile. *Held*, that the action may be maintained. *Underwriters at Lloyd's Ins. Co. v. Vicksburg Traction Co.*, 63 So. 455 (Miss.).

By the weight of American authority, one tortious act injuring a man as to his person and property gives rise to only one cause of action, with damage for two different sorts of injury; and judgment for the one injury bars a subsequent action for the other. *King v. Chicago, M. & St. P. Ry. Co.*, 80 Minn. 83, 82 N. W. 1113; see cases collected 50 L. R. A. 161. Under this doctrine the owner in the principal case would have been precluded from bringing any action for the injury to his property. Since an assignee can have no greater right than his assignor (*Savannah Fire & Marine Ins. Co. v. Pelzer Manufacturing Co.*, 60 Fed. 39), the plaintiff's action must be equally precluded. The court, however, purporting to accept the American doctrine, bases it entirely upon a policy which prevents a plaintiff vexing a defendant with two suits when one would suffice, and holds this policy inapplicable where the suits are brought by different parties. By thus restraining the operation of the doctrine that there is but one cause where the same act produces two kinds of damage, the court attains a most desirable result. But it would seem equally expedient and sounder on theory to accept the English view acknowledging the existence of two causes of action (see *Brunsdon v. Humphrey*, 14 Q. B. D. 141; 24 HARV. L. REV. 492), but to limit its application by the policy that where one action suffices, a plaintiff may sue but once although two dissimilar rights are injured.

LAW AND FACT — PROVINCES OF COURT AND JURY — WHETHER LOGICAL CONNECTION A PRELIMINARY QUESTION OF FACT FOR COURT. — The plaintiff was injured by a defective appliance furnished by the defendant, his employer.

To show that the plaintiff had notice of the danger, the defendant offered evidence of a conversation with respect to the defect, within twenty yards of the plaintiff. The court below excluded the evidence, because it was not satisfied that the plaintiff heard the conversation. *Held*, that whether the plaintiff heard the conversation was a question of fact for the court. *Gila Valley, G. & N. Ry. Co. v. Hall* (U. S. Sup. Ct., Case No. 68, Jan. 5, 1914).

Where a rule of evidence excludes logically probative matter unless it has satisfied certain prescribed tests, there is a preliminary question of fact for the court, whether these requirements have been complied with. *Boyle v. Wiseman*, 11 Ex. 360; *Comm. v. Brewer*, 164 Mass. 577, 42 N. E. 92. This principle should not be relaxed because of the fortuitous circumstance that the fact which is presented for the court's decision happens to be the precise issue upon which the jury is to pass. *Doe d. Jenkins v. Davies*, 10 Q. B. 314; *State v. Lee*, 127 La. 1077, 54 So. 356. *Contra, Respub. v. Hevice*, 3 Wheeler's Cr. Cas. (Pa.) 505. The weight to be given such evidence, of course, lies with the jury. *Welstead v. Levy*, 1 M. & Rob. 138; *Comm. v. Brewer, supra*. But the admission of the evidence rejected in the principal case would contravene no general rule of exclusion. The conversation regarding the defect is offered as the secondary link in a chain of circumstantial proof. The court requires, as a condition precedent to its admission, that the primary link — the fact that the plaintiff heard the conversation — be proved to the satisfaction of the judge. It is submitted, with deference, that the application of such a test is a usurpation of the jury's function. The secondary matter should come in, provided evidence is offered in support of the primary proposition, from which the jury, as reasonable men, could find the connection which the proponent of the evidence seeks to establish. *Stowe v. Querner*, L. R. 5 Ex. 155; *Comm. v. Robinson*, 146 Mass. 571, 16 N. E. 452.

**MUNICIPAL CORPORATIONS — FRANCHISES AND LICENSES — MODIFICATION ALLOWING INCREASE IN RATES.** — A municipality was empowered to award franchises only to the best bidder after due advertisement. Having awarded a franchise to a telephone company upon its agreement to furnish service to subscribers at a given rate, it subsequently relieved the company of this stipulation, allowing it to charge increased rates. *Held*, that the modification is valid. *Lutes v. Fayette Home Telephone Co.*, 160 S. W. 179 (Ky.).

Where a party, as sole beneficiary of a contract, is vested with direct rights against the promisor, he cannot be deprived of these rights by any agreement between the contracting parties. *Henderson v. McDonald*, 84 Ind. 149. See WALD'S POLLOCK ON CONTRACTS, 3 ed., 273. But such rights will not vest unless the parties to the contract so intend. *House v. Houston Waterworks Co.*, 88 Tex. 233, 31 S. W. 179. In the principal case, the municipality clearly intended to secure benefits for its citizens. However, aside from any question of rights in the franchise contract, the citizens have direct rights against the promisor to compel performance of its common law obligation as a public-service company. *Webster v. Nebraska Telephone Co.*, 17 Neb. 126, 22 N. W. 237. It would seem reasonable to suppose that the municipality intended merely to create a public-service company against which the citizens would have such rights, but to remain itself *dominus* of the contract. In such a case, the right of the municipality to agree with the co-contractor on alterations cannot be denied. *Meech v. City of Buffalo*, 29 N. Y. 198. However, so material an alteration as was here made would seem in effect the granting of a new franchise. By its charter the city was required to award franchises only after due advertisement and to the highest bidder. Unless, therefore, the defendant would probably have been the only bidder for a new franchise, so that advertisement would have been a mere matter of form (*City of Hartford v. Hartford Electric Light Co.*, 65 Conn. 324, 32 Atl. 925), the decision would seem incorrect.



**PERSONS — RIGHT TO DOWER — SECRET ANTE-NUPTIAL CONVEYANCE.** — A widower, before a second marriage, made a voluntary conveyance of land to an adult daughter by his former wife, without the knowledge of his fiancée. *Held*, that the second wife may claim dower in the land conveyed. *Deke v. Huenkemeier*, 260 Ill. 131, 102 N. E. 1059; *McAulay v. McAulay*, 79 S. E. 785 (S. C.).

For a discussion of the principles involved, see NOTES, p. 474.

**PHYSICIANS AND SURGEONS — SURGEON'S LIABILITY FOR NEGLIGENCE OF HOSPITAL NURSE AFTER OPERATION.** — A nurse attached to the hospital in which the defendant had operated on the plaintiff, negligently failed to remove a gauze drain. The plaintiff sues the defendant surgeon. *Held*, the surgeon is not responsible. *Hunner v. Stevenson*, 46 Chi. Leg. N. 163 (Md.).

A specialist is not an absolute insurer. He is held to that degree of skill and knowledge ordinarily possessed by physicians in similar localities who have devoted special study to the disease, having regard to the existing state of scientific knowledge. *Baker v. Hancock*, 29 Ind. App. 456, 63 N. E. 323. The position of a specialist who attends a hospital only to operate is that of independent contractor. *Harris v. Fall*, 177 Fed. 79, 85. During an operation he is in control. *Hillyer v. St. Bartholomew's Hospital*, [1909] 2 K. B. 820. For the negligence of the attendants while under his direction he should be responsible. *Jones v. Scullard*, [1898] 2 Q. B. 565; *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381. Moreover, if by reason of his unique knowledge he ought to know that some unusual treatment would be advisable, his failure to have it applied would seem to be a breach of that duty of care up to which he is held. After the operation the care of the patient devolves on the hospital only. *Harris v. Fall*, *supra*; *Baker v. Wentworth*, 155 Mass. 338, 29 N. E. 589. The principal case is in accord with this view. But even after the operation, if the specialist ought to know that extraordinary measures would be expedient, it seems that he should be responsible for injuries resulting from his failure so to direct.

**RES JUDICATA — PERSONS CONCLUDED — CO-DEFENDANTS: DECREE IN FAVOR OF ONE CO-DEFENDANT AS CONCLUSIVE IN LATER SUIT BY OTHER CO-DEFENDANT.** — In a former suit a debtor and three co-sureties had been sued together. Two of the sureties were there found not liable and the third paid the whole debt. To a suit by the latter for contribution, the two former pleaded the previous suit as a bar. *Held*, that the question of their original liability was not *res judicata*. *Central Banking & Security Co. v. United States Fidelity & Guaranty Co.*, 80 S. E. 121 (W. Va.).

The principles of *res judicata* are applied in two classes of cases. See *Cromwell v. County of Sac*, 94 U. S. 351, 352. In one class, the courts refuse to allow the same cause of action to be litigated again. *Young v. Farwell*, 165 N. Y. 341, 59 N. E. 143. But the doctrine of *res judicata* also includes the rule that any material point actually decided in one suit cannot be re-litigated where the same parties are opposed to each other in both suits. *Wright v. Griffey*, 147 Ill. 496, 35 N. E. 732; *Lynch v. Swanton*, 53 Me. 100. There seems no reason for a different rule when the parties were co-defendants in the first suit, if, as in the case of co-sureties, the judgment in favor of one defendant could have been appealed against by the losing co-defendant on the ground that his own liability was thereby increased. *Ruff v. Montgomery*, 83 Miss. 185, 36 So. 67. Policy requires that a question once judicially passed upon be final as to all parties who had an opportunity to litigate that question. In the principal case it is necessary for the plaintiff to prove that he and the defendants were liable as co-sureties. *Bulkeley v. House*, 62 Conn. 459, 26 Atl. 352. *Robinson v. Boyd*, 60 Oh. St. 57, 53 N. E. 494. If the former case had decided they were co-sureties, this finding would be evidence in the suit for

contribution, since the person sued for contribution has already had an opportunity to litigate the question. See *Lawrence v. Stearns*, 79 Fed. 878; *Love v. Gibson*, 2 Fla. 598. The same reasoning requires that the defendants be allowed to take advantage of the former finding that the relation of co-surety did not exist. *Cross v. Scarboro*, 6 Boxt. (Tenn.) 134; *Ledoux v. Durrive*, 10 La. Ann. 7. *Contra*, *Koelsch v. Mixer*, 52 Oh. St. 207, 39 N. E. 417.

RESTRAINT OF TRADE — COMBINATION OF OWNERS OF SEPARATE COPYRIGHTS TO FIX RESALE PRICE — EFFECT OF COPYRIGHT STATUTE. — The publishers of many copyrighted books combined to boycott all jobbers and booksellers who should not maintain the net prices of copyrighted books fixed by the individual members of the combination. *Held*, that there is an illegal restraint of trade. *Straus v. American Publishers' Association*, 34 Sup. Ct. 84.

This decision limits in another way the powers granted by the copyright and patent statutes to control copyrighted and patented articles after they have been sold. The holder of a copyright cannot limit the resale price by notice to the purchaser. *Bobbs-Merrill v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722. The rights of a patentee are similarly restricted. *Bauer & Cie v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616. See 27 HARV. L. REV. 73. The public policy against restraints on the alienation of chattels is in such cases apparent. See 26 HARV. L. REV. 640. By a decision which seems out of harmony with the spirit of these decisions, the Supreme Court has held, however, that a patentee may by notice require that a patented article should be used only with certain unpatented goods. *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364. On the other hand, contracts between the owner of a copyright or patent and with retailers, not to resell the copyrighted or patented articles below a certain price, have been held good in the lower courts. See 26 HARV. L. REV. 640; 19 HARV. L. REV. 125. Single contracts are obviously not objectionable but the legality seems doubtful when there is a system of agreements to limit the resale price. That such agreements by patentees are not protected by the patent statute has been suggested by the Supreme Court. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 33 Sup. Ct. 9. See 25 HARV. L. REV. 454. It is broadly stated in the principal case that the patent and copyright statutes are not intended to authorize agreements in restraint of trade. Probably the same reasoning would be applied to hold improper a system of agreements to control the resale price in the case of patented or copyrighted articles as in the case of goods made under a secret process. See *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 31 Sup. Ct. 376. See 24 HARV. L. REV. 244, 680. In holding that combinations by owners of several *separate* copyrights to control the retail prices of the copyrighted article are not protected by the copyright statute, the principal case seems clearly right. For a further discussion of the principles involved, see 19 HARV. L. REV. 125.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO THE USE OF PROPERTY — WHERE THE RELATION OF "DOMINANCY" AND "SERVIENCY" IS LACKING. — The plaintiff conveyed a certain lot in fee, the grantee covenanting for himself, his heirs and assigns, not to erect any flat or tenement building thereon within a period of twenty years. The covenantor later assigned the land to the defendant with notice, but without restrictions. At no time did the plaintiff own any land in the neighborhood aside from that conveyed. The defendant having started to construct an apartment house, the plaintiff seeks an injunction. *Held*, that the injunction be granted. *Van Sand v. Rose*, 103 N. E. 194 (Ill.).

The court proceeds on the ground of enforcing an equitable servitude created by virtue of the restrictive covenant. There is no doubt that when adjoining lands are intended to be benefited, a restrictive covenant is enforceable against an assignee with notice. *Tulk v. Moxhay*, 2 Phillips 774. But this



is strictly an equitable doctrine. See *London, etc. Ry. Co. v. Gomm*, 20 Ch. D. 562, 583. And it is a fundamental equitable principle that equity will not enforce a burden where there is no benefit derived. For example, equity refuses to specifically enforce a contract where no substantial benefit would result. *Miles v. Dover, etc. Iron Co.*, 125 N. Y. 294, 26 N. E. 261. So if the covenants in the principal case are considered as running with the land in equity, there being no benefit, they should not be enforced. But it seems that the effect of such restrictive covenants is rather to create an equitable property right, for when the right is once recognized damages are immaterial. *Peck v. Conway*, 119 Mass. 546. Yet if so considered, the same result follows, for it would clearly be unjust and contrary to sound policy to create a property right to satisfy a mere whim of a stranger. Where originally the adjoining lands were benefited, but due to a change in the neighborhood the benefit ceases, equity refuses to enforce the burden. *Jackson v. Stevenson*, 156 Mass. 496. *A fortiori*, where no adjoining land ever existed, equity should not recognize a property right at all. Nor is this analogous to an easement in gross at law, where these are permitted, for there a right of beneficial user is created in the quasi-dominant owner, while here no benefit whatever can be derived. It is submitted that there must be some physical or financial benefit to the neighboring lands or the covenantor's business, *i. e.*, some relation of "dominancy" and "serviency," or the covenant is only personal and collateral. See *Formby v. Barker*, [1903] 2 Ch. D. 539, 552. The authorities also are conclusive against the holding of the principal case. *Dana v. Wentworth*, 111 Mass. 291; *Formby v. Barker*, *supra*; *Rector v. Rector*, 135 N. Y. App. Div. 501, 114 N. Y. Supp. 623.

SALES — EXPRESS WARRANTIES — WHAT CONSTITUTES. — The plaintiff leased of the defendant a farm, together with all the implements upon it. Amongst the latter was a traction engine, in regard to which the defendant said before the lease was executed, "You have nothing to do but to flop the fly wheel and away she goes." The plaintiff sues for breach of warranty, basing his claim to an express warranty solely upon this statement. *Held*, that he may recover. *Tocher v. Thompson*, 26 West. L. Rep. 288 (Manitoba Ct. App.).

A recent decision in the House of Lords established for England the rule that an express warranty cannot arise without a distinct collateral agreement, including an offer to warrant by the vendor and acceptance by the vendee. *Heilbut v. Buckleton*, [1913] A. C. 30. For a criticism of this view, see article by Professor Williston in 27 HARV. L. REV. 1. The principal case, coming as it does from a Canadian jurisdiction, is interesting because while announcing the test of *Heilbut v. Buckleton*, it in fact grants recovery on what the American authority would treat as merely an affirmation of fact that induces the sale. See 21 HARV. L. REV. 555 ff. The court decided the case as though it were purely one of sale, although the actual transaction was a long-term bailment of the traction engine. It is submitted, however, that this should make no difference, and that whatever constitutes an express warranty in the law of sales should apply equally to the law of leases of chattels. It has long been clear that the bailor of a chattel for a specific purpose is subject to the rules of implied warranty. *Jones v. Page*, 15 L. T. Rep. n. S. 619.

SALES — STOPPAGE IN TRANSITU — EFFECT OF ATTORNMENT BY BAILEE. — Upon the insolvency of the vendee, a number of claims for stoppage *in transitu* were entered for goods held by the U. bleachery, an independent concern. On one lot, the goods before the sale had been bleached and held for the vendor and no notice of the sale had reached U. On another lot the goods were held as in the first case, but the vendee had given a delivery order to U., received delivery of part, and U. held the remainder subject to the vendee's order. On

a third lot, the vendor sold unbleached goods to the vendee and delivered to U., who put them in the vendee's name, and according to a previous arrangement with the vendee bleached at the vendee's direction and expense, and delivered a part. *Held*, that the right of stoppage *in transitu* continued on all the lots. *In re Poe Manufacturing Co.*, 80 S. E. 194 (S. C.).

The decision on the first claim is clearly correct. If a bailee without notice of the sale holds goods for the vendor, the latter's lien may be exercised, as the goods remain in his constructive possession. *M'Ewan v. Smith*, 2 H. L. Cas. 309; *In re Batchelder*, 2 Low. 245, 2 Fed. Cas. No. 1099. After the bailee is notified to deliver to the purchaser, the right of stoppage *in transitu* exists until the bailee attorns to the buyer. *Rowe v. Pickford*, 8 Taunt. 83; *Norfolk Hardwood Co. v. New York Central & H. R. R. Co.*, 202 Mass. 160, 88 N. E. 664. The partial delivery of the second lot suggests attornment, but is not conclusive. *Ex parte Cooper*, 11 Ch. D. 68. But attornment appears in the bailee's holding the remainder subject to the vendee's order. *Guilford v. Smith*, 30 Vt. 49. As to the third lot, the bailee by previous agreement held subject to the buyer's directions from the very start. *Cf. Scott v. Pettit*, 3 B. & P. 469; *In re Batchelder*, *supra*. The bailee was under a duty also to bleach the goods. A bailee's additional duty to the purchaser other than carriage is such an attornment as to end the transit. See *Bethel v. Clark*, 20 Q. B. D. 615, 617; *Harris v. Pratt*, 17 N. Y. 249, 263; WILLISTON, SALES, § 524; 23 HARV. L. REV. 142. This has been applied where the extra duty was forwarding elsewhere. *Norfolk Hardwood Co. v. New York Central & H. R. R. Co.*, *supra*. The duty to bleach seems *a fortiori* such a submission to the purchaser as to terminate the vendor's rights.

**SPECIFIC PERFORMANCE — NEGATIVE CONTRACTS — CONTRACT TO BUY BEER FROM PLAINTIFF ONLY.** — The defendant contracted to buy from the plaintiff all the beer used in the defendant's saloon for a certain period, and not to buy from any one else. The contract contained a provision for liquidated damages. The plaintiff seeks to enjoin the defendant from buying of any other dealer. *Held*, that the injunction will not be granted. *Bartholemae & Roesing Brewing Co. v. Modzelewski*, 47 Nat. Corp. Rep. 686 (Ill. App. Ct.).

The question of enforcing a negative contract in regard to land has usually arisen in connection with restrictions that are really equitable servitudes. In such cases no damage would be necessary for relief. The plaintiff is protected by some courts because the covenant will not run at law. *Catt v. Tourle*, 4 Ch. App. 654. The better theory is that the servitude is a property right, a forced sale of which would be unjust. (See criticism, in this issue of the Review, of the Illinois case of *Van Sand v. Rose*, 103 N. E. 194, 27 HARV. L. REV. 494.) Such a servitude could be imposed on the defendant's business as well as on his land. *Wilkes v. Spooner*, 27 T. L. R. 157. It is, however, the intent of the parties that creates these servitudes, as inferred from the agreement and the surrounding circumstances. *Peck v. Conway*, 119 Mass. 546. As the court in the principal case points out, no such intent is apparent here, so there is no servitude, but a mere negative contract. The adequacy of the legal remedy is therefore important. The damage that will be caused the plaintiff by the defendant's buying from competitors will exceed the damage from the mere loss of the sale, and will be purely conjectural. The presence of a provision for liquidated damages will not prevent specific performance. *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419. It is therefore submitted that the injunction should have been granted.

**THEATRES — RIGHTS OF TICKET HOLDER.** — The plaintiff, during the course of a moving picture performance, for which he had purchased a reserved seat, was ejected from the defendant's theatre, with no unnecessary force. He brings



an action for assault and battery. *Held*, that the plaintiff may recover. *Hurst v. Picture Theatres, Ltd.*, 30 T. L. Rep. 98 (K. B. Div., Nov. 18, 1913).

By the purchase of his ticket the plaintiff gets no legal property right; for there is no intention to create a lease, and it does not seem that the possession is of such a nature as to create this interest. *Wood v. Leadbitter*, 13 M. & W. 838. *Cf. White v. Maynard*, 111 Mass. 250; *Hancock v. Austin*, 14 C. B. N. S. 634. *Contra, Drew v. Peer*, 93 Pa. 234. The ticket holder has a license to enter the theatre and remain there. But since it is not coupled with an interest, it is revocable at the will of the licensor, although consideration has been paid. *Hewlins v. Shippam*, 5 B. & C. 221. On revocation the licensee becomes a trespasser. *Ruggles v. Lesore*, 24 Pick. (Mass.) 187. But, in a jurisdiction like that of the principal case, where there is a fusion of law and equity, if the plaintiff's license gives him a right of which equity will take cognizance it would seem enough to defeat the defendant's justification for the ejectment. See SALMOND, TORTS, 3 ed., p. 247. But obviously no equitable servitude can be imposed by this contract, even though the requisite intent to create it be admitted. The contract neither imposes a restriction, nor is there any property to which the benefit of the servitude could attach. *Dana v. Wentworth*, 111 Mass. 291. Also specific performance of the contract, as such, would be denied under these facts, because of the substantial adequacy of legal damages and the trivial nature of the contract. *Carter v. Ferguson*, 58 Hun (N. Y.) 569. Since a theatre, although licensed by the state, is not a public service company, no tort liability can be based on the mere failure to perform the affirmative duty undertaken. *Purcell v. Daly*, 19 Abb. N. C. (N. Y.) 301. The court therefore seems to have erred in permitting recovery in tort.

TITLE, OWNERSHIP, AND POSSESSION — POSSESSION — RIGHT OF ADVERSE POSSESSION TO RECOVER DAMAGES FOR PERMANENT DEPRECIATION. — The plaintiff, in adverse possession of land, seeks to recover for permanent injuries caused by the defendants' diverting a watercourse. *Held*, that the plaintiff cannot recover. *La Salle County Carbon Coal Co. v. Sanitary Dist. of Chicago*, 103 N. E. 175 (Ill.).

The better view seems to be that one in adverse possession of land has title as regards all the world except the true owner. Consistently with this view, the early English statutes of limitations protected the possessor negatively, by barring the right of the true owner. See LIGHTWOOD, POSSESSION OF LAND, p. 153. Moreover, the policy of the law was to safeguard possession as such. See POLLOCK & MAITLAND, HISTORY OF THE ENGLISH LAW, Vol. II, p. 42. And this is believed to be the true basis of the theory of "tacking interests" by successive possessors. See 3 HARV. L. REV. 322. In recognition of this view, an adverse possessor is allowed to have ejectment against any one not claiming under the outstanding title. *Asher v. Whillock*, L. R. 1 Q. B. 1; *contra, Doe d. Carter v. Barnard*, 13 Q. B. 945. See 20 HARV. L. REV. 563. It is also well settled that an adverse possessor may have trespass against third parties. *Reed v. Price*, 30 Mo. 442; *Frisbee v. Town of Marshall*, 122 N. C. 760, 30 S. E. 21. As between the owner and one in possession, the latter is the proper plaintiff to bring trespass. *Campbell v. Cushman*, 4 U. C. Q. B. 9. If the land is held adversely, the true owner cannot have trespass. *Cook v. Foster*, 7 Ill. 652; *Ruggles v. Sands*, 40 Mich. 559. But in the case of a permanent injury there is a possibility that the true owner may reestablish his possession and sue. Consequently, to allow the adverse possessor to recover for permanent depreciation might lead to a double recovery against the trespasser. This practical difficulty could be met by requiring the damages to be paid into court, to be held for the true owner until the statutory period had run. See 20 HARV. L. REV. 563. It seems, therefore, that the adverse possessor should recover for permanent injuries. The authorities, however, support the view of the prin-

cipal case. *Anderson v. Thunder Bay River Boom Co.*, 57 Mich. 216, 23 N. W. 776; *Winchester v. City of Stevens Point*, 58 Wis. 350, 17 N. W. 3. *Contra*, *Cobb v. Illinois & St. L. R. & Coal Co.*, 68 Ill. 233.

UNFAIR COMPETITION — INTERFERENCE WITH MAKING OF CONTRACT — WHEN JUSTIFIED — INTERFERENCE INCIDENTAL TO GENERAL RESTRAINT OF TRADE. — A carpenter's union consistently refused to handle any lumber manufactured in an "open shop." Plaintiff, an "open shop" manufacturer, seeks to enjoin this boycott so far as it affects his product. *Held*, that no injunction will issue. *Paine Lumber Co., Ltd., v. Neal*, 50 N. Y. L. J. 1497 (U. S. D. C., So. Dist. of N. Y., November, 1913).

For a discussion of some phases of the "secondary boycott," see NOTES, p. 478.

USURY — PURGING OBLIGATION OF THE TAINT OF USURY — EFFECT OF NEW CONSIDERATION. — To secure an usurious loan, the defendant placed on his land a first mortgage, which by the statute of usury was a valid lien only to the amount actually lent. In consideration of the surrender of this security and the permission to place a large first mortgage on the land, the defendant gave to the plaintiff a second mortgage which still secured a sum larger than that actually lent and executed a release of all claims for usury taken. The plaintiff sues to foreclose this second mortgage. *Held*, that he is entitled to a decree for the full amount secured, without deductions for usury. *Blohm v. Hannan*, 88 Atl. 622 (N. J.).

It is well settled that the taint of an originally usurious obligation affects all securities in the form of notes and mortgages into which the usurious element can be traced. *Cobe v. Guyer*, 237 Ill. 568, 86 N. E. 1088; *Nicrosi v. Walker*, 139 Ala. 369, 37 So. 97. By mutual agreement, of course, the parties may exclude all usurious items from the transaction and substitute a new security covering only the amount lawfully due. *Vermeule v. Vermeule*, 95 Me. 138, 49 Atl. 608; *Phillips v. Columbus City Building Ass'n*, 53 Ia. 719, 6 N. W. 121; *Sanford v. Kunz*, 9 Ida. 29, 71 Pac. 612. Such an arrangement may even validate the original securities. *Warwick v. Dawes*, 26 N. J. Eq. 548. *Contra*, *Miller v. Hull*, 4 Den. (N. Y.) 104. So long as usurious elements remain, however, the mere intervention of new obligors or obligees does not remove the taint. *Bridge v. Hubbard*, 15 Mass. 96; *Fitzpatrick v. Apperson's Executrix*, 79 Ky. 272. But a renewal of the original security given to a holder for value without notice is held to be purged of usury. *Cuthbert v. Haley*, 8 T. R. 390; *Kent v. Walton*, 7 Wend. (N. Y.) 257. The authorities also generally agree that the taint of usury will not extend to an obligation founded upon new consideration, unless the arrangement is a device to evade the statute of usury. Thus a new loan subsequent to a *bond fide* payment of the usurious debt will be free from usury. *Hoopes v. Ferguson*, 57 Ia. 39, 10 N. W. 286. *Cf. Shinkle v. First National Bank of Ripley*, 22 Oh. St. 516. And the usury does not affect a new security given to the usurer by one who has contracted with the debtor to pay the debt. *Scott v. Lewis*, 2 Conn. 132; *Cramer v. Lepper*, 26 Oh. St. 59. *Cf. Smith v. Young*, 11 Bush. (Ky.) 393. See WILLISTON'S WALD'S POLLOCK, CONTRACTS, 275. But the surrender of the usurious obligation as between the original parties could not be new consideration within this rule without practically nullifying the statute of usury. *King v. Perry Ins., etc. Co.*, 57 Ala. 118. In the principal case, however, the subordination of the original mortgage appears to satisfy the conception of new consideration, and the decision is undoubtedly correct.

WATERS AND WATERCOURSES — FLOOD WATERS — NON-RIPARIAN OWNER'S RIGHT TO FLOWAGE. — The defendant erected an embankment on its land and thus cut off water which, during flood times, overflowed from a watercourse



and crossed over the defendant's land to the non-riparian land of the plaintiff. The plaintiff, being thus deprived of the fertilizing effect of the water, seeks damages. *Held*, that he may recover. *Thompson v. New Haven Water Works*, 86 Atl. 585 (Conn.).

For a discussion of the principles involved, see NOTES, p. 476.

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## BOOK REVIEWS.

**CERTAINTY AND JUSTICE.** By Frederick R. Coudert. New York and London: D. Appleton and Company. 1913. pp. vii, 320.

This book is a series of eleven essays, nine of them contributed to various legal periodicals during the last ten years, and two now printed for the first time. Despite the circumstances of their first appearance, the essays constitute a well-considered and homogeneous body of thinking on the topic indicated by the general title. Mr. Coudert brings to the age-long discussion of the importance of certainty in the administration of justice an abundance of apt and interesting illustrative material, gathered from a wide experience as a practitioner, a well-trained and thoughtful reflection not only upon his own experience and that of the American bar, but also upon a familiarity with the law and legal machinery of continental Europe and particularly of France. Indeed one of the most obvious morals of the book is the value which an acquaintance with the modern civil law of continental Europe possesses for the active practitioner, and even more for the thoughtful jurist and legal reformer. Mr. Coudert is all of these, and his contribution to the problems of legal reform is everywhere enhanced in importance by his familiarity with the achievements of the other great legal system of Western civilization.

The first three essays of the book set forth its central thesis — that our day demands a greater flexibility in the administration of justice than has been possible to the courts under a somewhat indiscriminating devotion to the ideal of certainty as formulated in the rule of *stare decisis*. He favors what he would call a liberal interpretation of both the unwritten and the written law, and especially the provisions of the Constitution. He is willing to trust the task of this interpretation to a thoroughly trained and professionally high-minded bench and bar, learned not only in the more definite legal lore which constitutes their professional equipment, but also in the traditions of their calling and the ideals therein formulated. In the hands of such a bench and bar a decreasing regard for precedent *qua* precedent might well be replaced by an increasing familiarity with the social and economic ends which the administration of justice is, after all, only a means of achieving. Mr. Coudert is no doubt right in believing that professional training and idealism, giving us an adequately prepared bench and bar, are our surest guaranties of an efficient administration of justice. On the other hand, it seems unfortunate that his analysis of the fields in which certainty is desirable and those in which the very nature of the subject-matter makes rigid rules unworkable has not been more thorough-going. The real antithesis in juristic thought is not between certainty and justice, but between the field of rule and that of discretion. Justice sometimes demands a certain rule; at other times it demands the possibility of a judicial discretion regulated only by a proper training in the processes of judicial thinking, and by a proper education preparing the administrator to appreciate the social ends which will be affected by the wisdom or unwisdom of

his decision. To be more specific, in the fields of property and commercial dealings, certainty, a definite and ascertainable rule by which men can plan for future transactions, is the paramount desideratum. On the other hand, in those fields of law involving problems of human conduct and personal relations, — in questions, for example, of tort, of divorce, of fiduciary relations, such as trusts or agency, — free play must be given to the discretion of the trained administrator. It is in the delimitation of these two fields, both of them essential in the administration of justice, that the work surely lies which at present most needs to be done. It is unfortunate, then, that any antithesis should even be suggested between certainty and justice, though the antithesis lies rather in the title than in the content of Mr. Coudert's thoughtful and suggestive book.

Nevertheless it must be said that the apparent approval with which Mr. Coudert regards the alteration, by the indirect method of interpretation, of definitely formulated rules such as make up our written constitutions is to be regretted. The courts who by any spurious interpretation change a definite rule while ostensibly paying homage to it are doing a serious disservice to the cause of justice, as well as to that certainty which the lawyer of an earlier generation prized as the most valuable element of the law. Where a change ought to be made, it is better that the judicial branch of the government be patient until the popular demand has formulated itself with sufficient definiteness and grown to sufficient earnestness to produce a direct and thorough-going amendment by legislation, rather than that it unsettle the popular mind as to the efficacy of any form of words, however definite, to lay down a rule of law, by forcing upon such form of words in any particular instance an interpretation which in fairness it cannot be said it was intended by its framers to bear. The popular mind has already too deeply rooted in it the impression that it is the highest exhibition of legal skill to drive a coach and four through gaps in the most careful devices of language, — hence no doubt a large part of the popular distrust which Mr. Coudert recognizes to exist against his profession. Pretty obviously the remedy for this distrust is not to use this astuteness to achieve presently popular ends by means which the ethical sense of the community cannot permanently approve. The public, though they may be gratified to find their wishes served by such a display of legal acumen, cannot but in the long run come to feel that this same acumen may sometime be used to frustrate the popular will as embodied in enactments which they wish enforced with literal strictness. Indeed this is the state of mind which now exists, and no use of powers of interpretation will permanently alter it. Mr. Coudert suggests much more accurately the real remedy for the popular distrust of the legal profession when he emphasizes the need of high ideals and adequate education for the lawyer. With the administration of justice in the hands of a bench and bar thus properly prepared, there will be no need for the frequent suggestion that rules or documents which seem to hamper the development of a modern and rapidly changing society may be nullified by any process of indirection.

C. A. H.

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A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK. By William W. Cook. Seventh Edition. Boston: Little, Brown, and Company. 1913. 5 volumes. pp. lxxii, 4984.

In reviewing the most recent edition of a book which, like Cook on Corporations, has been steadily developed through many previous editions, it is unnecessary to describe in detail the general characteristics which the latest edition shares with those that have gone before. Any lawyer who has had to do in recent years with corporations has known that he could not be sure that



he had found all the authorities on any point of corporation law until he had consulted Mr. Cook's book. There he would find, under the appropriate section, nearly if not quite all the authorities from every jurisdiction, not only cited, but probably stated in some detail. Such a treatise — even though the statement of cases be confined as closely as possible to long notes — is not the best form in which to present forcefully and clearly the theory of corporation law, to weigh its conflicting decisions, and to unify the whole; but it is an excellent method of making accessible to the practicing lawyer the exact judicial opinion for which he is seeking, without compelling him to read the many unstated cases cited in an encyclopedia. For this reason the sixth edition of Cook on Corporations has been found to be very useful, and in the same field the seventh edition promises to surpass all its predecessors.

As stated in the preface, the present edition contains about sixty thousand citations of cases, about six thousand of which have been decided in the five years which have passed since the publication of the previous edition. Except in a few instances, these decisions have not caused Mr. Cook to change materially his statement of the law; but their mere insertion in the text and notes, has added to the present edition about three hundred and sixty-five pages. This new matter is scattered almost evenly over the whole field covered by the three thousand seven hundred pages of the previous edition. In a few instances a change has been made in the statement of the law, or new statements have been made, indicated sometimes by changed sub-headings in the very complete analysis contained in the chapter headings. The more noticeable changes and additions occur in relation to the following subjects: various *ultra vires* acts; criminal liability of promoters for fraud; certain elements in contracts for sale of stock and in the liabilities of brokers; amendment of charters; restraint of trade and monopolies; voting trusts; dissolution; fraud by majority stockholders; authority of corporate officers and agents; public-service companies and various matters of procedure. To comment upon the changes in detail is beyond the scope of this review. It is sufficient to say that the new matter is handled so similarly to the old, and inserted so carefully in the right place, that the reader could hardly detect it if it were not for the dates of the citations of the cases.

In the last volume of the present edition there have been inserted for the first time ninety-one forms, occupying some two hundred pages. These forms do not purport to cover the whole field of ordinary practice; but they do contain copies of instruments of known value which could not easily be obtained by the average lawyers, as for example, the purposes and by-laws of the United States Steel Corporation; the organization of Chicago Street Railway Trust; the underwriting agreement in connection with Union Pacific four per cent twenty-year convertible bonds; and the mortgage of the Great Northern Railway in 1911. These forms are a most valuable collection.

This review would not be complete without a reference to the introduction which contains a second presentation of Mr. Cook's theory that if government ownership of railroads is to be avoided, the federal government should form a gigantic holding company to acquire gradually the stock of all the railroads of the country. The stock of this holding company should pay three per cent dividends per annum and be sold to the public, and the directors should be elected by the Interstate Commerce Commission, or possibly by the stockholders under restrictions that would prevent a few large stockholders from obtaining control. This theory was presented in the introduction to the sixth edition, but the changes made in the later presentation together with the criticism by Mr. Acworth, a leading English railroad authority and member of the Vice Regal Commission on Irish Railways, and Mr. Cook's reply thereto, make this second presentation — which is very interesting in itself — the more interesting to those who have read the former exposition. P. K.

ELEMENTARY PRINCIPLES OF THE ROMAN PRIVATE LAW. By W. W. Buckland, M. A., Fellow and Tutor of Gonville and Caius College, Cambridge. Cambridge: University Press. 1912. pp. viii, 419.

This is a new type of elementary book on Roman law. Indeed it is not elementary in the sense that has been made too familiar by the general run of manuals and compendiums in English. Instead it is the type of elementary book which may be written only by one who has mastered his subject and may be used only by one who desires to study the problems which his subject raises, and not merely to pass a conventional elementary examination.

In form the book is a running commentary on Gaius and the Institutes; not in the usual manner of such commentaries, however, but in the form of stating the problems that grow out of the texts, and the difficulties involved in reconstructing the institutions and doctrines of the classical Roman law on the basis thereof. As stated by the author, the purpose is "to discuss institutions rather than to state rules, to suggest and stimulate rather than to inform." This purpose is well carried out. The teacher familiar with the controversies which continental scholars have been raising, especially in their attempts to recover the law of the third century from the palimpsests, as it were, which interpolations in the Digest have made of the excerpts from the classical jurists, will find that the problems that are worth while have been selected with much judgment and have been stated critically. He will find, moreover, that the author has thought about them and so has been able to give an independent value to his way of raising them.

If there are still those who study law by themselves, as many of us had to do substantially in the past, they could make no mistake in taking such a book after the Institutes and Gaius, and attempting to wrestle with the questions which it suggests by the aid of the Digest and the references to the modern books. But in such a subject as Roman law students of this sort are likely to be teachers. It is probable, therefore, that the book will be used more by teachers than by students.

The tendency of recent scholarship on the Continent is in the direction of historical and institutional study of the Roman law prior to Justinian. We must not forget, however, that Justinian's law books were the materials upon which those wrought who built up our modern law and that the "gemeines Recht" of the eighteenth and nineteenth centuries which resulted has possibly more value for Anglo-American students because of its relation to comparative law. Study of the way in which the same problem is dealt with in the Anglo-American common law, in the modern codes and in this common law of continental Europe, and comparison of the way in which the Roman law, as found in the Digest, has been developed into law for modern Europe with the way in which we are treating our classical common-law tradition, may possibly be as important and as valuable as reconstruction of the legal institutions of the days of the Antonines. Recently "Pandekten" have been pushed to one side in Germany and yet one may suspect that this study of the common law which culminated in the code may presently prove fruitful as a new common law develops on the basis thereof. At any rate it would seem desirable that instead of continuing to follow continental scholarship English and American students of Roman law devote at least part of their time to the body of doctrines based upon the Digest which underlies the law of all that part of the modern world which does not speak English.

R. P.



THE EYRE OF KENT, 6 AND 7 EDWARD II, 1313-14, Volume III; being Volume VIII of the Year Book series of the Selden Society and Volume XXIX of its Proceedings. Edited by William Craddock Bolland. London: Bernard Quaritch. 1913. pp. lii, 242.

Again we have an interesting and well-edited Year Book from competent hands. The cases are almost entirely concerned with land, and of direct interest to a student of the history of our land-law. Such incidental matters as repay inquiry are put before us in the painstaking introduction. The editor also considers the burgage "assize of fresh force." He works out from obscure sources such economic facts as the salary of the judges (£40 for a Chief Justice, and seldom paid) and of the clerks; and the cost of hares, rabbits, and capons. A hare, it seems, cost only half as much as a rabbit; a fowl only about half a good capon; and a rabbit rather more than a capon. He also explores the meaning of the mysterious word "eel" in the statute of Westminster I, and finds it no more occult than the somewhat disguised first syllable of *aliud*. Again the clever editing reminds us of Maitland; and we hope that the editor's farewell is not for long. There is many an unpublished Eyre roll; and Mr. Bolland has proved that the Eyre is quite as interesting to the legal historian as the bench itself.

J. H. B.

THE LAW AS A VOCATION. By Frederick J. Allen. Boston: The Vocation Bureau. 1913. pp. 100.

BANKS AND BANKING. By John D. Falconbridge. Second Edition. Toronto: Canada Law Book Company, Limited. 1913. pp. lxviii, 857.

CRIMINOLOGY. The Modern Criminal Science Series. By Baron Raffaele Garofalo. Boston: Little, Brown, and Company. 1914. pp. xl, 478.

THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY. By Charles Grove Haines. New York: The Macmillan Company. 1914. pp. xviii, 365.

CASES ON CONSTITUTIONAL LAW. American Casebook Series. By James Parker Hall. St. Paul: West Publishing Co. 1913. pp. xxxii, 1452.

COMMENTARIES ON EVIDENCE. Volumes I, II, and III. By Burr W. Jones. San Francisco: Bancroft-Whitney Company. 1913. pp. xxvii, 1031, 1071, 1036.

BOYCOTTS AND THE LABOR STRUGGLE. By Harry W. Laidler. New York: John Lane Company. 1914. pp. 488.

GREAT JURISTS OF THE WORLD. Continental Legal History Series. Edited by Sir John Macdonell and Edward Manson. Boston: Little, Brown, and Company. 1914. pp. xxxii, 607.

THE VALIDITY OF RATE REGULATIONS. By Robert P. Reeder. Philadelphia: T. and J. W. Johnson Co. 1914. pp. xv, 440.

LAW RELATING TO THE COLONIES. By Sir Charles J. Tarring. Fourth Edition. London: Stevens and Haynes. 1913. pp. xxiv, 398.

ESSAYS IN LEGAL HISTORY. Edited by Paul Vinogradoff. New York: Oxford University Press. 1913. pp. viii, 396.

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## CONSIDERATION IN BILATERAL CONTRACTS.

IT seems difficult for writers on the law to achieve unanimity as to the fundamental nature of the consideration necessary to support a promise, and especially is this true where bilateral contracts are concerned. Doubtless the difficulty is partly due to decisions of the courts not wholly consistent with each other, and sometimes partly to a desire to combine a reformation of the law with a statement of it. Some inadequacy in a previous essay of mine,<sup>1</sup> together with the fact that my work as a teacher of the law of contracts compels me to deal with the subject, leads me to give a further expression of my views; though I do so not without reluctance, as I cannot avoid some criticism of the opinions of others with whom I dislike to have a difference.

In the first place, clearness of thought is promoted by using the word consideration as meaning consideration in fact irrespective of its legal sufficiency or validity. Whatever definition may be given to the consideration necessary to support a promise is immaterial for this distinction. Whether it be supposed that detriment to the promisee is a universal definition of what the law requires or whether benefit to the promisor is a permitted alternative, or whether a past indebtedness or a past act done at the promisor's request is likewise enough, the distinction of nomenclature is equally important. If then, it is said that a

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<sup>1</sup> 8 HARV. L. REV. 27. Though this essay, as it seems to me, is not guilty of any serious flaw in reasoning, it does not fully state my present views.



promise has no consideration, the meaning will be that in fact no exchange was given for the promise (or no past debt or requested act was in fact the foundation for it). Such will be the situation wherever the promise was intended to be gratuitous, and also wherever the thing in consideration for which the promise was offered was not actually given. On the other hand, if it is said that a promise is not supported by sufficient or good or valid consideration, the meaning is that though the promisor may have asked and received a return for his promise, (or though the promise may have had some basis in fact) the return (or basis) is not such as the law considers sufficient to make the promise enforceable.<sup>2</sup>

When the words "sufficient consideration" are used, no question of illegality or of public policy in any restricted sense is to be understood. It is doubtless generally true that consideration given in fact but illegal, or in violation of public policy, will not support a promise;<sup>3</sup> and it is also true that whatever may be the requirements of sufficient consideration, those requirements, like

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<sup>2</sup> Professor Ballantine has advanced (11 Mich. L. Rev. 423) the suggestion that mutual promises are not really consideration for one another, and that such a statement is elliptical and should be understood as meaning that the performances are consideration for one another. Any mutual promises which contemplate the exchange of performances, since such mutual promises have the elements of a bargain, he regards as constituting a contract. It is not desirable to upset received legal terminology unless some important gain is to be obtained. At best, Professor Ballantine's mode of statement does not improve upon ordinary usage, and is further open to the criticism of being inadequate to explain certain cases. Doubtless it is almost universally true that the performance promised by one party to a bilateral agreement is intended as the consideration for the performance on the other side. A double exchange is contemplated. Promise is the price or exchange for promise and later performance for performance, but this is not always true. If A. promises B. to guarantee a debt of one hundred dollars due B. from X. in return for B.'s promise to A. to guarantee payment of five hundred dollars due A. from Y., the performances are in no sense in exchange for one another, or the consideration of one another, and yet there is a contract. Matters may so turn out that either party alone may be called upon to perform or that both parties or neither party may have to pay. The promises are exchanged, though the performances are not expected to be, and even though the chance falls out that both parties have to pay, their payments are not in exchange for one another. They never proposed to exchange one hundred dollars for five hundred. The facts supposed are suggested by *Christie v. Borelly*, 29 L. J. C. P. N. S. 153 (1860). The same situation arises in all aleatory contracts except where the promises of both parties are conditioned on the same event. In short one promise is the consideration of the other, because it is in fact exchanged for it. Such is the statement constantly made in written bilateral agreements, and such is the truth.

<sup>3</sup> It is not invariably true. See Williston, Sales, § 663.

all rules of law, are in a broad sense dictated by public policy. Nevertheless, the distinction is important between consideration which is merely insufficient, and consideration which is illegal or in violation of some other public policy than that which requires an equivalent satisfactory to the law to be given for a promise in order that the promise shall be binding.<sup>4</sup> In the present essay my only attempt will be to define the sufficiency of consideration as thus distinguished from its legality.

When endeavoring to apply the doctrine of consideration to bilateral contracts a lawyer instinctively seeks to apply the same definition that has been adopted for unilateral contracts. Let it be supposed that this is detriment to the promisee or perhaps, as an alternative, benefit to the promisor. Such detriment or benefit may be sought in bilateral agreements either in the making of a promise in fact, or in the obligation in law created by a promise. Professor Ames took the former alternative;<sup>5</sup> Sir Frederick Pollock,<sup>6</sup> though saying, "It is true that the promise itself, not the obligation thereby created is the consideration," has inserted in the last edition of his treatise a passage which seems inconsistently to state that not the promise in fact, but the obligation of the promise is requested;<sup>7</sup> and at all events is explicit that whether or not the making of the promise as a fact or the obligation of the promise in law is requested, the reason that a promise is sufficient consideration is because it creates a detrimental obligation. Professor Langdell also<sup>8</sup> is explicit only to the same ex-

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<sup>4</sup> The importance of the distinction is shown for instance by: "The general principle . . . that if part of a consideration be merely *void*, the contract may be supported by the residue of the consideration, if good *per se*; *Bradburne v. Bradburne*, Cro. Eliz. 149 (1590); *Tisdale's Case*, Cro. Eliz. 758 (1600); *Crisp v. Gamel*, Cro. Jac. 128 (1607); but if any part of a consideration be *illegal*, it vitiates the whole. *Featherston v. Hutchinson*, Cro. Eliz. 199 (1591); *Bridge v. Cage*, Cro. Jac. 103 (1606); *Scott v. Gilmore*, 3 Taunt. 226 (1810); *Woodruff v. Hinman*, 11 Vt. 592 (1839); 2 Saund. R. (Patteson & Wms. ed.), 136, n. 2." *Cobb v. Cowdery*, 40 Vt. 25, 28 (1867). So a covenant under seal based on consideration which is illegal or opposed to public policy is as invalid as if the promise were *parol*.

<sup>5</sup> 12 HARV. L. REV. 29, 32.

<sup>6</sup> Principles of Contract, 8 Eng. ed., 192, 3 Am. ed., 202.

<sup>7</sup> "If it be suggested that the mere utterance of words of promise is trouble enough to be a consideration, the answer is that such is not the nature of the business. Moving of the lips to speak or of the fingers to write is not what the promisor offers or the promisee accepts." Pollock, 8 Eng. ed., 191.

<sup>8</sup> Summary of Contracts, § 81.



tent. He says that the making of a "binding promise" is something of value; and in his argument,<sup>9</sup> applies his test for consideration — detriment to the promisee — to the obligation assumed to be created by the promise.<sup>10</sup>

It seems to me that generally speaking, it is the promise in fact which the offeror requests — not a legal obligation. This is shown, as Professor Ames has said, by the form which such an offer ordinarily takes in fact, and by the form in which a bilateral contract is declared upon, the plaintiff stating merely that in consideration of his promise, the defendant promised. An offeror contemplating the formation of a bilateral contract says nothing of obligations, and asks only a promise in fact. Whether the offeror has bound himself by an obligation and whether he has got one in return is for the law to decide. This is true generally in the formation of contracts.

"A contract has, strictly speaking, nothing to do with the personal, or individual intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent."<sup>11</sup>

When a man makes a promise it is immaterial whether he knows that it creates an obligation.<sup>12</sup> So when an offeror asks and receives a promise, the law determines whether or not the promise which he receives shall create a legal obligation on other grounds than the intent of the parties that it shall do so.<sup>13</sup> If it were

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<sup>9</sup> *E. g.*, § 84.

<sup>10</sup> Professor Ashley, who follows Langdell closely, argues that "in the average case" it is the obligation not merely the promise in fact which the offer for a bilateral contract requests. *Law of Contracts*, § 31.

<sup>11</sup> Hand, J., in *Hotchkiss v. National City Bank*, 200 Fed. Rep. 287, 293 (1911).

<sup>12</sup> One who promises to pay a debt barred by the Statute of Limitations need not know, and frequently does not know that his promise creates a new obligation. A surety who promises to pay a debt though excused by a technical failure to charge him, must know the facts, but need not know their legal effect.

<sup>13</sup> The statement of Savigny which has been popularized for English and American lawyers by Sir Frederick Pollock and others, that an intent to form a legal relation is a requisite for the formation of contracts, cannot be accepted. It may be good Roman law but, if so, it shows the danger of assuming that a sound principle in Roman law may be successfully transplanted. Nowhere is there greater danger in attempting such a transfer than in the law governing the formation of contracts. In a system of law which makes no requirement of consideration, it may well be desirable to limit enforceable promises to those where a legal bond was

true that the request of the offeror were for an obligation rather than for a promise in fact, no fair construction of the offer could permit any other conclusion than that the obligation requested by the offeror was an effective and enforceable obligation, not one unenforceable or voidable at the option of the promisor. Yet, as Professor Ames points out,<sup>14</sup> promises which are voidable or unenforceable on account of fraud, infancy, the Statute of Frauds, or illegality, are sufficient to support counter-promises. If the counter-promisor in such a bargain requested a legal obligation, it can hardly be true that he has received what he asked for. Certainly no offeror who in terms requested an obligation could have had in mind such a feeble bond.

It will not do to urge that a voidable or unenforceable obligation is recognized by the law as within the pale of legal obligations. The inquiry here concerns what the offeror in fact requests and the law cannot, under recognized rules, impose a contract upon him unless he has been given what his request reasonably should be understood to mean. Contracts where one promise is voidable or unenforceable present some difficulty with regard to the law of consideration,<sup>15</sup> but it has not been supposed that they violate fundamental principles of mutual assent.

It is doubtless generally true, though not always, that the reason why the offeror requests a promise in fact is because he expects thereby to acquire an obligation in law, but the reason for his request must not be confused with the request itself.

It must be admitted, however, that it is possible for an offeror to request in his offer the creation of a legal obligation. A. can certainly say to B., — "If you will give me a simple contract right

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contemplated, but in a system of law which does not enforce promises unless a price has been asked and paid for them, there is no necessity for such a limitation and I do not believe it exists. The only proof that it does will be the production of cases holding that though consideration was asked and given for a promise it is, nevertheless, not enforceable because a legal relation was not contemplated. If, however, the parties in effect agree that they will not be bound, this like any other manifested intention will be respected.

Besides the cases referred to in the text, I may suggest the liability of a member of a voluntary association on contracts made on behalf of the association.

"It is of no legal significance that the defendants did not intend to be individually responsible, or that they did not know or believe that as a matter of law they would be." *Davison v. Holden*, 55 Conn. 103, 112, 10 Atl. 515.

<sup>14</sup> 13 HARV. L. REV. 33.

<sup>15</sup> See *infra*, p. 528.



against you for your horse, I will give you a simple contract right against me for one hundred dollars," and it will probably not be doubted that acceptance of such an offer will create a contract, or that the validity of an agreement which provided in terms for the exchange of legal obligations, barring perhaps cases of voidable and of unenforceable promises, will be tested in the same way as if the offeror had requested a promise in fact rather than an obligation in law. So that even if ordinarily it is merely a promise in fact for which the offeror asks, as it is at least possible that an obligation in law may be requested, any difficulties which are involved in that assumption must be met. A technical difficulty, at least, in applying the test of consideration applicable to unilateral contracts exists either on the assumption that a promise in fact is requested or on the assumption that an obligation in law is desired.

If, as I believe is generally the case, it is the promise in fact which the offeror requests, the inquiry naturally follows, why does not a bilateral contract arise whenever a requested promise is given in response to an offer? No satisfactory answer to this question can be made if the definition of consideration in unilateral contracts is of universal application, for whichever of various definitions that have been suggested as appropriate for unilateral contracts, is adopted, the act of making a promise at request will technically satisfy its requirements.

On the other hand, if the offeror were conceived of as asking for a legal obligation, the opposite difficulty is presented in any attempt to apply to bilateral agreements the definition of consideration appropriate to unilateral contracts. The inquiry has been made by Sir Frederick Pollock, "What logical justification is there for holding mutual promises good consideration for each other? None, it is submitted."<sup>16</sup> And this conclusion is justified, if the only principles which we have to go upon are that the offeror requests a legal obligation as the return for his offer, and that in that legal obligation must be found a detriment or benefit necessary under the definition of consideration in unilateral contracts. For these premises involve inevitably a circular line of argument. If a detriment is necessary to support a promise,

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<sup>16</sup> 28 Law Quarterly Rev. 101; Pollock on Contracts, 8 Eng. ed., 191.

and therefore to give rise to an obligation binding upon either party, there can be no detriment without an obligation, and, under the rule of consideration which it is sought to apply, there can be no obligation without a detriment. Moreover, the burden is on one who asserts there is a contract to establish it. He will never be able to establish a bilateral contract upon these premises.<sup>17</sup> It is necessary to state as a further proposition that "the act of exchanging the promises makes them enforceable . . . one of the secret paradoxes of the Common Law,"<sup>18</sup> and thereupon also to inquire whether exchanging all mutual promises makes them enforceable, or whether this is true of only a certain kind of mutual promises and if so, what is the kind.

It makes very little ultimate difference therefore whether, conceiving that the mutual assent given in the creation of a bilateral contract is an assent to an exchange of promises in fact, we are driven to ask why all mutual promises<sup>19</sup> which do not contravene

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<sup>17</sup> It is at this point that the argument of Professor Langdell, in his essay on consideration, in 14 HARV. L. REV. 496, fails. On page 504, he states the method of pleading in contracts, and says that by alleging and proving mutual promises "the plaintiff will, in the absence of any proof by the defendant, establish his case unless the court shall be of opinion that one of the mutual promises, even if supported by a sufficient consideration, is not binding." But the cases of pleading suggested are not in point. It is, of course, true that a defendant who seeks to show that the facts stated in the declaration are not the only essential ones in the case, must allege and prove the additional facts; but when all the facts are before the court, the burden is always on the plaintiff to establish a legal cause of action. The question is not here in regard to disputed facts; all the facts must be taken as known. Under such circumstances the plaintiff has no right to assume that he has a cause of action in order to argue that he has one, nor can the court make any such assumption. When Professor Langdell says the plaintiff will establish his case by proving mutual promises unless apart from consideration one of the promises is not binding, he can be justified in so asserting only if he assumes each promise by one having capacity is necessarily a detrimental obligation to the promisor, or if he assumes the mere making of a promise in fact by such a person is a sufficient detriment. The universality of his statement will not strictly be justified even if he were permitted to assume that any promise which if binding would impose a detriment is sufficient consideration, though I believe from his general argument that the last is the assumption he actually made. But certainly none of these three propositions can be accepted without proof that it represents the law. In fact I believe all of them are at variance with the law and, therefore, unsound.

<sup>18</sup> 30 Law Quarterly Rev. 129, presumably by Sir Frederick Pollock. I see nothing paradoxical about it. All that is necessary is to understand and state that the rules governing consideration in unilateral contracts will not cover the bilateral situation, and a special rule is required.

<sup>19</sup> That is, all mutual promises which would be valid if under seal.



public policy do not make contracts (unless we assert that they all do) as logic would lead us to suppose; or whether conceiving that a bilateral contract is based on assent to an exchange of legal obligations and rebelling from the impossibility of ever logically proving the existence of mutual obligations from the definition of consideration in unilateral contracts, we assert as a further principle that the exchange of the promises makes them enforceable and seek the limits of this apparent principle.

Whichever point of view we take we are turned to the cases to find what kind of mutual promises have been held by the law sufficient consideration for one another; but before doing so, the arguments of Professor Ames that all mutual promises not opposed to public policy create contracts should be answered, since I cannot accept his conclusions.

Though the technical requirements of the definition of consideration in unilateral contracts may be fulfilled by giving any promise in fact, it is obvious that a promise which assures the performance of an act which the law regards as of no value, is merely a technical exchange for a counter-promise, and that if the law is to be practically as well as technically reasonable, the mere making of such promise irrespective of its content, should be insufficient. The only possible answer to this is to maintain, as Professor Ames maintained, that any act whatever, other than a promise, is sufficient consideration for a unilateral contract. If this is true it is reasonable to assert that the promise of any act may likewise be sufficient consideration. But it cannot be admitted that any act or forbearance which is requested as the consideration for a unilateral contract is legally sufficient.

Professor Ames's argument in support of his thesis as to unilateral contracts, is based on an examination of the law governing three classes of cases: namely, those where the consideration consists of,

1. The forbearance to prosecute a groundless claim;
2. The performance of a pre-existing contractual duty to a person other than the promisor;
3. The performance of a pre-existing contractual duty to the promisor himself.

As to the first group of cases, Professor Ames regarded the recent English decisions as deciding that whenever a man thinks he has a good or doubtful cause of action, forbearance of an attempt to en-

force it is sufficient consideration to support a promise. He further believed that this rule would ultimately prevail in the United States. Whether the English law goes so far as to hold that an honest though utterly unreasonable belief in the possible validity of a claim is sufficient to make forbearance by the claimant effectual as consideration, may be open to question, though one decision seems to go to that extreme.<sup>20</sup> The weight of American authority does not yet support such a proposition, though it seems probable that an honest and reasonable belief in the possible validity of a claim would generally be held enough to make the forbearance valid consideration.<sup>21</sup> Whichever of these statements may be taken as desirable or representative of the law, however, there is no inconsistency with the definition that not any act or forbearance whatever but only one which is a legal detriment to the promisee or legal benefit to the promisor is sufficient to support a unilateral contract; for it may well be argued that one who has an honest belief in the validity of his claim has a legal right to attempt its enforcement, and that to forbear to exercise this right is a legal detriment. It seems to have been at one time assumed by the English law that only one who has a valid claim has a right to attempt to enforce his demand. The modern law simply rejects this artificial assumption.

The second group of cases, which includes those where performance of a pre-existing contractual duty to a person other than the promisor is the consideration, affords still less support to the argument. Such cases as sustain the validity of the consideration (a numerical minority) do so because the court holds the promisor in the second contract has received a benefit from the perform-

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<sup>20</sup> *Ockford v. Barelli*, 25 L. T. Rep. 504 (1871).

<sup>21</sup> There is almost invariably in the decisions upholding the validity of an agreement of compromise of an invalid claim some language indicating that the claim must have been reasonably made as well as made in good faith. Expressions in two recent cases may be taken as illustrations.

In *Jackson v. Volkening*, 81 N. Y. App. Div. 36, 80 N. Y. Supp. 1102 (1903), the Court says: "It is sufficient if there were any plausible grounds for a *bonâ fide* claim, and it was made in good faith."

In *Neubacher v. Perry*, 103 N. E. 805, 806 (Ind. App., Jan. 9, 1914): "If he was in good faith disputing appellees' claim and was insisting on a construction of the contract which might reasonably be contended for by one not versed in the law, his claim would constitute a sufficient consideration for an accord and satisfaction or compromise."



ance of the promisee, not because anything requested is sufficient consideration. This benefit, it will be noticed, was one to which the promisor was not previously entitled by law. A mild protest must be entered against a method of using these cases, or of using any cases, as if they would support equally well any theory of the law which would involve the same result. Unless the ground on which the court rested the decisions can first be shown to be inadequate for their support, there is no necessity or, indeed, opportunity, to seek for another basis. To do otherwise is to treat the rulings of the court "as the utterings of Balaam's ass, absolutely true, but not presupposing any conscious intelligence in the creatures from whom they proceed."<sup>22</sup> Doubtless it is true that in any large subject there are inharmonious decisions, and that it is not the part of an intelligent lawyer to believe in inconsistent decisions at the same time. And it may also be important to show, as Professor Ames undertakes to show, that a novel line of reasoning will not involve the reversal of many actual decisions; but until some one shows that the reasons given by the court are untenable because of inconsistency with other cases, those reasons must be regarded as controlling.

The third class of decisions which Professor Ames examines consists of cases where performance of a contractual duty to the promisor himself, is the consideration given for the defendant's promise. These are mainly cases where payment of part of a liquidated debt was made in consideration of an agreement to discharge the whole.

That payment of a liquidated debt or part of it will not support any promise by the creditor, is conceded by Professor Ames to be the general rule of law, but he cites early authorities showing that in the sixteenth century the law was probably otherwise. Where there are scores of decisions in the eighteenth and nineteenth centuries, it is submitted that an inquiry as to the law of the sixteenth century is merely of historical interest. That some modern courts have objected to the law on this matter is doubtless true, and it is also true that inconsistently with the general rule several creditors may by simple contract compound their claims against a common debtor and bind themselves effectually to discharge the balance due them; but it is equally clear that the general rule is almost

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<sup>22</sup> Professor Gray, 7 HARV. L. REV. 406.

universally settled law, and that it is regarded by the courts not as an exceptional doctrine but as an exemplification of the general principle that an act which is neither legally detrimental to the promisee, nor legally beneficial to the promisor, is insufficient consideration to support a promise. The extent of the changes which have been made by statute or decision in various jurisdictions of the doctrine that payment of part of the debt is insufficient to support an agreement to discharge the whole debt, is not great. In a very few jurisdictions, the law has been changed by decision,<sup>23</sup> and in a few others by statute.<sup>24</sup>

<sup>23</sup> *Clayton v. Clark*, 74 Miss. 499, 22 So. 189 (1897); *Frye v. Hubbell*, 74 N. H. 358, 68 Atl. 325 (1907); *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798 (1899); *Baldwin v. Daly*, 41 Wash. 416, 417, 83 Pac. 724 (1906).

<sup>24</sup> In North Carolina any agreement to settle the claim by payment in part, is valid whether executed or executory. *Jones v. Coffey*, 109 N. C. 515, 14 S. E. 84 (1891); *York v. Westall*, 143 N. C. 276, 55 S. E. 724 (1906); *Pruden v. Asheboro & M. R. Co.*, 121 N. C. 509, 28 S. E. 349 (1897); *Ramsey v. Browder*, 136 N. C. 251, 48 S. E. 651 (1904). The Indian Contract Act, § 63, is equally broad, as is British Columbia Supreme Court Act, sec. 19, sub-sec. 25. In Georgia (Code, § 4329), Maine (Rev. St. c. 84, § 59), and Virginia (Code, § 2858), an agreement actually executed by the payment of part of a debt discharges the debt in accordance with the intention of the parties. But an executory agreement to pay part is insufficient consideration. *Molyneux v. Collier*, 13 Ga. 406 (1853); *Stovall v. Hairston*, 55 Ga. 9 (1875); *English v. Reid*, 55 Ga. 240 (1875); *Blalock v. Jackson*, 94 Ga. 469, 20 S. E. 346 (1894); *Burgess v. Denison Paper Mfg. Co.*, 79 Me. 266, 9 Atl. 726 (1887); *Fuller v. Smith*, 107 Me. 161, 77 Atl. 706 (1910). See also *Standard Sewing Mach. Co. v. Gunter*, 102 Va. 568, 46 S. E. 690 (1904). In Alabama (Code, § 3973), California (Civil Code, § 1524), No. Dakota (Rev. Code of 1905, § 5272), Oregon (Hill's Ann. Laws § 765), South Dakota (Rev. Code, § 1180), Tennessee (Code (1896), § 5571), are statutes which give to a written receipt or to a written agreement to accept a part payment in full the same effect which the common law gave to a release under seal. See *Stegall v. Wright*, 143 Ala. 204, 38 So. 844 (1905); *Dobinson v. McDonald*, 92 Cal. 33, 36, 27 Pac. 1098 (1891); *Eggland v. South*, 22 S. Dak. 467, 118 N. W. 719 (1908); *Hagen v. Townsend*, 27 S. D. 457, 131 N. W. 512 (1911). In these states it will be noted a seal has generally been deprived of its common-law efficacy, and the statutes are aimed at supplying the deficiency by giving to a receipt the effect of a release. Part payment of a debt is in these states insufficient consideration to support an agreement to discharge the debt. *Scott v. Rawls*, 159 Ala. 399, 48 So. 710 (1909); *Peachy v. Witter*, 131 Cal. 316, 63 Pac. 468 (1901); *Hagen v. Townsend*, (So. Dak., 1911) 131 N. W. 512; *Miller v. Fox*, 111 Tenn. 336, 76 S. W. 893 (1903), unless accompanied by a written receipt in full. The same effect is given without the aid of statute to such a receipt in a few states, most of which have modified by statute the common-law rules as to sealed instruments. *Dreyfus v. Roberts*, 75 Ark. 354, 87 S. W. 641 (1905); *Aborn v. Rathbone*, 54 Conn. 444, 8 Atl. 677 (1886); *Green v. Langdon*, 28 Mich. 221 (1873); *Gray v. Barton*, 55 N. Y. 68 (1873); *Ferry v. Stephens*, 66 N. Y. 321 (1876); *Carpenter v. Soule*, 88 N. Y. 251 (1882); *McKenzie v. Harrison*, 120 N. Y. 260 24 N. E. 458 (1890).



Such changes even if regarded as commendable, do not seem to warrant an argument against the accuracy of the generally received definition of consideration; they either indicate assent by a small minority of courts to the suggestion of Sir Frederick Pollock that it has not proved fortunate to apply the doctrine of consideration which is rather appropriate to the formation of the contracts, to the discharge of them,<sup>25</sup> or that in a single class of cases an exception to a general rule is desired. In none of the statutes or decisions is any broader result sought than to affect the particular group of cases in question.

The decisions where some performance to which the promisee was bound to the promisor other than the payment of a debt (as for instance completing a building or other piece of work) is given as the consideration for a promise are to the same effect. Almost uniformly they deny the validity of such consideration.<sup>26</sup>

<sup>25</sup> Pollock, on Contracts, 8 Eng. ed. . . . 3 Am. ed. . . .

<sup>26</sup> *Harris v. Watson*, Peake 72 (1791); *Stilk v. Myrick*, 2 Camp. 317 (1809); *Frazer v. Hatton*, 2 C. B. N. S. 512 (1857); *Jackson v. Cobbin*, 8 M. & W. 790 (1841); *Mallalieu v. Hodgson*, 16 Q. B. 689 (1851); *Harris v. Carter*, 3 E. & B. 559 (1854); *Alaska Packers' Assoc. v. Domenico*, 117 Fed. 99 (1902); *Shriner v. Craft*, 166 Ala. 146 (1910); *Main Street Co. v. Los Angeles Co.*, 129 Cal. 301, 61 Pac. 937 (1900); *Littlepage v. Neale Publishing Co.*, 34 App. D. C. 257 (1910); *Bush v. Rawlins*, 89 Ga. 117, 14 S. E. 886 (1892); *Davis v. Morgan*, 117 Ga. 504, 43 S. E. 732 (1903); *Willingham Sash Co. v. Drew*, 117 Ga. 850, 45 S. E. 237 (1903). Cf. *Poland Paper Co. v. Foote*, 118 Ga. 458, 45 S. E. 374 (1903); *Nelson v. Pickwick Associated Co.*, 30 Ill. App. 333 (1889); *Goldsborough v. Gable*, 140 Ill. 269, 29 N. E. 722 (1892); *Moran v. Peace*, 72 Ill. App. 135, 139 (1897); *Allen v. Rouse*, 78 Ill. App. 69 (1898); *Mader v. Cool*, 14 Ind. App. 299, 42 N. E. 945 (1895); *Ayres v. Chicago, etc. R. Co.* 52 Iowa 478, 3 N. W. 522 (1879); *McCarty v. Hampton Building Assoc.*, 61 Iowa 287, 16 N. W. 114 (1883); *Howard v. McNeil*, 25 Ky. L. Rep. 1394, 78 S. W. 142 (1904); *Wescott v. Mitchell*, 95 Me. 377, 50 Atl. 21 (1901); *Parrot v. Mexican C. R. Co.* 207 Mass. 184, 93 M. E. 590 (1911); *Bell v. Oates*, 97 Miss. 790, 53 So. 491 (1910); *Storck v. Mesker*, 55 Mo. App. 26 (1893); *Wear v. Schmelzer*, 92 Mo. App. 314 (1902); *Easterly v. Jackson*, 29 Mont. 496, 75 Pac. 357 (1904); *Esterly Harvesting Machine Co. v. Pringle*, 41 Neb. 265, 59 N. W. 804 (1894); *Voorhees v. Woodhull's Exr's*, 33 N. J. L. 494 (1869); *Bartlett v. Wyman*, 14 Johns. (N. Y.) 260 (1817); *Vanderbilt v. Schreyer*, 91 N. Y. 392 (1883); *Carpenter v. Taylor*, 164 N. Y. 171, 58 N. E. 53 (1900); *Weed v. Spears*, 193 N. Y. 289, 86 N. E. 10 (1908); *Schneider v. Heinsheimer*, 55 N. Y. Supp. 630 (1899); *Jughardt v. Reynolds*, 68 N. Y. App. Div. 171, 74 N. Y. Supp. 152 (1902); *Moore v. Bloomingdale*, 126 N. Y. Supp. 125 (1910); *Galway v. Prignano*, 134 N. Y. Supp. 571 (1912); *United Merchants' Press v. Corn Products Refining Co.*, 134 N. Y. Supp. 578 (1912); *Festerman v. Parker*, 10 Ired. (N. C.) 474 (1849); *Erb v. Brown*, 69 Pa. 216 (1871); *Jones v. Risley*, 91 Tex. 132, S. W. 1027 (1895); *Whitsett v. Carney* (Tex. Civ. App.), 124 S. W. 443 (1910); *Creamery Package Mfg. Co. v. Russell*, 84 Vt. 80, 78 Atl. 718 (1911); *Tolmie v. Dean*, 1 Wash. Ter. 57 (1858); *Magoon v. Marks*.

In a few jurisdictions only has a contrary view prevailed.<sup>27</sup> This group of cases is therefore flatly opposed to Professor Ames's theory. Even in the case which he supposes,<sup>28</sup> of an agreement in the following terms: "In consideration of the builder's promise to abandon all claim against the employer on the old contract, the employer promises to abandon all claim on the old contract, and to pay the old price plus the additional amount, provided the builder completes the job," the agreement, it is submitted, would create no contract. It must be conceded that the original agreement, if still in part at least unperformed on each side, may be rescinded by mutual consent.<sup>29</sup> And if the original agreement is rescinded, a new agreement made thereafter on any terms to which the parties assent will be binding. Therefore, a rescission followed shortly afterwards by a new agreement in regard to the same subject matter, would create legal obligations according to the terms of the subsequent agreement. It must further be conceded that when a second agreement is made which is intended by the parties as a substitution for the original contract, there is always mutual

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11 Hawaii, 764 (1899). See also *Hartley v. Ponsonby*, 7 E. & B. 872 (1857); *Eastman v. Miller*, 113 Ia. 404, 85 N. W. 635 (1901); *Proctor v. Keith*, 12 B. Mon. (Ky.) 252 (1851); *Eblin v. Miller's Exec'r*, 78 Ky. 371 (1880); *Endriss v. Belle Isle Ice Co.*, 49 Mich. 279, 13 N. W. 590 (1882); *Conover v. Stillwell*, 34 N. J. L. 54, 57 (1869); *Hanks v. Barron*, 95 Tenn. 275, 32 S. W. 195 (1895). A promise by the contractor to do work beyond what the contract required in consideration of the contract being carried out by the other party is equally invalid. *Jughardt v. Reynolds*, 68 N. Y. App. Div. 171, 74 N. Y. Supp. 152 (1902); *Garr v. Green*, 6 N. Dak. 48, 68 N. W. 318 (1896).

<sup>27</sup> *Stoudenmeier v. Williamson*, 29 Ala. 558 (1857); *Bishop v. Busse*, 69 Ill. 403 (1873); *Cooke v. Murphy*, 70 Ill. 96 (1873). (But see *Moran v. Peace*, 72 Ill. App. 135 (1897)); *Coyner v. Lynde*, 10 Ind. 282 (1858); *Holmes v. Doane*, 9 Cush. (Mass.) 135 (1851); *Rollins v. Marsh*, 128 Mass. 116 (1880); *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122 (1885); *Thomas v. Barnes*, 156 Mass. 581, 584, 31 N. E. 683 (1892); *Brigham v. Herrick*, 173 Mass. 460, 53 N. E. 906 (1899). (But see *Parrot v. Mexican C. R. Co.* 207 Mass. 184, 93 N. E. 590 (1911)); *Moore v. Detroit Locomotive Works*, 14 Mich. 266 (1866); *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284 (1882); *Conkling v. Tuttle*, 52 Mich. 630, 18 N. W. 391 (1884); *Scanlon v. Northwood*, 147 Mich. 139, 110 N. W. 493 (1907); *Osborne v. O'Reilly*, 42 N. J. Eq. 467, 9 Atl. 209 (1887); *Lattimore v. Harsen*, 14 Johns. (N. Y.) 330 (1817); *Stewart v. Keteltas*, 36 N. Y. 388 (1867). See also *Peck v. Requa*, 13 Gray (Mass.) 407 (1859); *Blodgett v. Foster*, 120 Mich. 392, 79 N. W. 625 (1899); *King v. Duluth Ry. Co.*, 61 Minn. 482, 63 N. W. 1105 (1895); *Hansen v. Gaar, Scott & Co.*, 63 Minn. 94, 65 N. W. 254 (1895); *Gaar v. Green*, 6 N. Dak. 48, 68 N. W. 318 (1896); *Dreifus v. Columbian Co.*, 194 Pa. 475, 45 Atl. 370 (1900); *Evans v. Oregon, etc. R. Co.* 58 Wash. 429 (1910).

<sup>28</sup> 12 HARV. L. REV. 529.

<sup>29</sup> See Wald's *Pollock, Contracts*, 3 ed., 815.



assent to the rescission of the earlier agreement. But calling an agreement an agreement for rescission does not do away with the necessity of consideration.<sup>30</sup> And when the agreement for rescission is coupled with a further simultaneous agreement that the work provided for in the earlier agreement shall be completed and that the other party shall give more than he originally promised, the total effect of the agreement is that one party promises to do exactly what he had previously bound himself to do, and the other party promises to give an additional compensation therefor. If for a single moment the parties were free from the earlier contract so that each of them could refuse to enter into any bargain whatever relating to the same subject matter, a subsequent agreement on any terms would be good, but to go through the motions of saying in consideration of being released from building a house as hereinbefore agreed, I promise to build just such a house for a higher price, is as ineffectual as if the agreement for greater compensation were put more baldly.

The result, therefore, of the three classes of cases to which Professor Ames appeals, is that in one of the groups (the third), the decisions are necessarily opposed to his theory. In the other two groups the conclusion reached by a large proportion, perhaps the majority of courts, cannot be reconciled with his definition; and those decisions which support the validity of the consideration are rested by the courts on other grounds than those suggested by him; and these other grounds are harmonious with the decisions on the law of consideration generally, and with the definitions customarily given by the courts.

Since, therefore, a due regard for judicial authority prevents one from believing the law to be that any act requested may serve for the consideration of a unilateral contract, it seems unreasonable, even if there were no other difficulty, to hold that the making of any promise would be sufficient to support a counter-promise. Moreover, there are further difficulties precluding assent to such a theory. While it would explain more simply than any other the fact that a voidable or unenforceable promise is sufficient consideration to support a counter-promise, the argument goes too far, for it would also follow that a void promise or an illusory promise

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<sup>30</sup> See Wald's *Pollock*, *Contracts*, 3 ed., 815.

would be sufficient consideration; but the law, of course, is otherwise. A promise which is void is insufficient consideration,<sup>31</sup> and the cases indicate no inquiry on the part of the court whether the party giving a promise in exchange for the void promise knew or did not know the facts which made void the promise he received.<sup>32</sup>

Illusory promises also, on Professor Ames's theory, would furnish sufficient consideration if requested as the exchange for a counter-promise, and that they are frequently so requested with intent to make a bargain cannot be successfully disputed. A contractor or seller is often so eager to obtain work, or a sale, that he will gladly subject himself to an absolute promise in return for one which leaves performance optional with the other party. This is most commonly illustrated in agreements to buy or sell goods where the quantity is fixed by the wishes of one of the parties. But a promise to buy such a quantity of goods as the buyer may thereafter order,<sup>33</sup> or to take goods "in such quantities as may be desired,"<sup>34</sup> is insufficient consideration for a counter-promise.

Finally, the whole reasoning of the cases in regard to consideration is opposed to any theory that mutual promises are universally sufficient consideration for one another. There would be no occasion for all the discussions in the opinions. It would be enough for the court to say, without more, that the parties had made mutual promises.

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<sup>31</sup> Thus the promise of a married woman under disability to contract is not sufficient to support a counter-promise. *Smith v. Plomer*, 15 East. 607, 610 (1812); *Shaver v. Bear River, etc. Co.*, 10 Cal. 396 (1858); *Warner v. Crouch*, 14 Allen (Mass.) 163 (1867); *Andriot v. Lawrence*, 33 Barb. (N. Y.) 142 (1860). See also *Howe v. Wildes*, 34 Me. 566 (1852); *Warren v. Castello*, 109 Mo. 338, 19 S. W. 29; (1891); *Henrici v. Davidson*, 149 Pa. 323, 24 Atl. 334 (1822); *Williams v. Graves*, 7 Tex. Civ. App. 356, 26 S. W. 334 (1894); *Shenandoah Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239 (1889). But see *Chamberlin v. Robertson*, 31 Ia. 408 (1871). And wherever the promise of an infant is void and not merely voidable, it is not sufficient. *Johnson v. Rockwell*, 12 Ind. 76, 81 (1859); *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76, 77 (1817).

<sup>32</sup> See *Meyer v. Haworth*, 8 A. & E. 467 (1838): If lack of knowledge of these facts made a difference, it might be urged that mistake rather than lack of consideration was the reason for the invalidity of the bargain.

<sup>33</sup> *Great Northern Ry. Co. v. Witham*, L. R. 9 C. P. 16 [1873]; *Cold Blast Transportation Co. v. Kansas City Bolt Co.*, 114 Fed. Rep. 77 (1902); *T. B. Walker Mfg. Co. v. Swift*, 200 Fed. 529 (1912).

<sup>34</sup> *American Cotton Oil Co. v. Kirk*, 68 Fed. 791 (1895); *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. 302 (1895); *Rafolovitz v. American Tobacco Co.*, 29 Abb. N. C. 406, 23 N. Y. Supp. 274 (1893); *Hoffman v. Maffioli*, 104 Wis. 630, 80 N. W. 1032 (1899).



Since, then, it cannot be admitted that mutual promises are always sufficient consideration for one another, it becomes necessary to determine in what cases a promise is a sufficient consideration for a counter-promise. Two tests have been suggested either explicitly or implicitly:

1. Sir Frederick Pollock and Professor Langdell apply this test: If the obligation of a promise would be a detriment to the promisor (assuming that the promise creates a binding obligation) the promise is sufficient consideration.

2. "That most accurate of writers, Mr. Stephen Leake,"<sup>35</sup> whose work on contracts has long been a standard treatise, says, however, —

"So far as regards the matter of the consideration, as being executed or executory, it may be observed that whatever matter, if executed, is sufficient to form a good executed consideration; if promised, is sufficient to form a good executory consideration: so that the distinction of executed and executory consideration has no bearing upon the question of the sufficiency of any particular matter to form a consideration."<sup>36</sup>

I believe that the second of the views thus stated is that sanctioned by the law, and, moreover, intrinsically is the more reasonable of the two. When bilateral contracts were first recognized no elaborate discussion was had of the requirements of a promise in order that it might be sufficient consideration for another promise. It was simply decided that a promise was sufficient consideration for another promise. It was not long, however, before some definition was made of the character of a promise which would be sufficient consideration for another promise. Lord Holt stated that "where the doing a thing will be a good consideration, a promise to do that thing will be so too."<sup>37</sup> In subsequent cases there has

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<sup>35</sup> 2 *Law Quarterly Rev.* 113.

<sup>36</sup> Leake on Contracts, 1 ed., page 314; 2 ed., pp. 612, 613. In the third edition the author states in his preface that finding the book "has been more used in the practice of the profession than in the study of the law, for which as originally prepared, he thought it might perhaps be useful . . . he has endeavored to revise the work strictly for the service of the profession with the single aim of presenting a convenient digest of the leading principles of the law of contracts as derived from judicial exposition." The author, with this aim in view, considerably diminished the size of the book, and the passage, above quoted, was omitted.

<sup>37</sup> *Thorp v. Thorp*, 13 *Mod.* 455 (1701).

been very little attempt at exact definition, but the notorious failure of the courts to mark the distinction between unilateral and bilateral contracts until recently (of which the failure to provide any brief name to distinguish the two is an indication), shows that the court must have applied to bilateral contracts a test which would be just as applicable had the contract been unilateral, and an examination of the cases shows that even where it plainly appears that the contract was bilateral, the court in discussing the sufficiency of consideration, considered the character of the things promised.<sup>38</sup> But occasionally a court has made a statement in clear terms. Lord Blackburn, than whom no better modern authority could be cited, stated the principle as follows:

"The general rule is, that an executory agreement by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced, if what the plaintiff has agreed to do is 'either for the benefit of the defendant or to the trouble or prejudice of the plaintiff.'" <sup>39</sup>

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<sup>38</sup> In *Thomas v. Thomas*, 2 Q. B. 851 [1842], there was plainly set out a written agreement containing mutual promises. The court in considering the sufficiency of consideration examined the nature of the things promised. Thus Lord Denman said: "Then the obligation to repair is one which might impose charges heavier than the value of the life estate." So *Patteson, J.*, in speaking of the sufficiency of the plaintiff's promise, expressly considers the sufficiency of the things promised by her; namely, payment of rent and making of repairs. Such statements as that made in *Benson v. Phipps*, 87 Tex. 578, 29 S. W. 1061 (1895), "a promise to do what one is not bound to do, or to forbear what one is not bound to forbear, is a good consideration for a contract," necessarily involve the assumption that no promise is sufficient consideration unless the thing promised would be. In *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998 (1897), and *Simpson v. Sanders*, 130 Ga. 265, 268, 60 S. E. 541 (1908), the court said: "If one assumes under such an agreement [by mutual promises] to do a special act beneficial to another, and that other under the terms of the contract is under no obligation to perform an act of corresponding advantage to the former, the agreement is without such consideration as will support the promise of the party assuming to perform." In *Schuler v. Myton*, 48 Kans. 282, 29 Pac. 163 (1892); the court said: "It is well settled that an agreement to do or the doing of which one is already bound to do does not constitute a consideration for a new promise." Similarly in *Cobb v. Cowdery*, 40 Vt. 25, 28 (1867), the court said: "And so it would be in any other case where the only consideration for the promise of one party was the promise of the other party to do, or his actual doing, something which he was previously bound in law to do." See also *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224 (1889), where in dealing with a written contract containing mutual promises and signed by both parties the court (at page 53) discusses the insufficiency of certain acts promised to serve as consideration.

<sup>39</sup> *Bolton v. Madden*, L. R. 9 Q. B. 55, 56 [1873].



The Minnesota court has made an equally plain statement:

"The case is, then, one of a promise on the part of the plaintiff to do something of advantage in law to the defendant, and on the part of the defendant to do something of advantage in law to the plaintiff — a case of mutual promises, one of which is the consideration of the other. The agreement was valid and binding upon both parties."<sup>40</sup>

The elaborate definition given in *Currie v. Misa*,<sup>41</sup>

"A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."

contains in substance the same principle.<sup>42</sup> The definitions of modern American text writers often state clearly the same test.<sup>43</sup>

Until it can be shown that the statements thus referred to are opposed to actual decisions, or at least that there are plainly inconsistent judicial statements in the books, I may be excused for believing that my quotations represent the law. I have not found judicial statements inconsistent with them. So far as decisions go, the cases are few where an actual difference of result would be produced, according as one accepts Sir Frederick Pollock's definition, or Mr. Leake's. The most sharply defined difference is in regard to the third party cases, which have been more discussed than any others relating to the law of consideration.

Under the definition of Sir Frederick Pollock and Professor Langdell a bilateral agreement between B. and C. by which B. promises to do something which he was previously legally bound to do by contract with A., is a valid contract, since assuming B.'s promise to C. to be binding, it imposes a new detriment on B.,

<sup>40</sup> *Schweider v. Lang*, 29 Minn. 254, 13 N. W. 33 (1882).

<sup>41</sup> L. R. 10 Exch. 153 [1875].

<sup>42</sup> To have stated the matter exactly, the words "or undertaken" which are contained in the last clause of the definition, should also have been included in the first clause.

<sup>43</sup> "Such promise is as lawful a consideration as the thing promised would have been." Page, *Contracts*, § 296. "A promise given in consideration and because of the fact that another promise is given, is binding provided the promise given is for the performance of some act which if executed would be a sufficient consideration for an obligatory unilateral contract." Elliott, *Contracts*, § 231. "A promise to do an act, or forbearance from doing an act, is just as valuable consideration for a promise as the act or forbearance would be." 9 Cyc. 323.

namely, liability to a new person in case of non-performance of the promised act; though both Sir Frederick Pollock and Professor Langdell contend that had B. performed the act in question at C.'s request instead of promising to perform it, the previous obligation to A. would have prevented the performance from being a detriment in law to B., and no new contract would be formed.

Under Mr. Leake's definition, no distinction is possible between cases where the second agreement is bilateral and where it is unilateral. If the performance is sufficient consideration for a contract, the promise of performance is likewise sufficient. If actual performance is insufficient, so is a promise of performance. Now how are the authorities?

In England it has been settled that such agreements are valid contracts. In the actual cases the contracts in suit seem to have been unilateral; but none of the commentators, nor the courts themselves suggest any reason for supposing bilateral agreements would not equally have been upheld.<sup>44</sup>

In the United States the weight of authority is opposed to the validity of such agreements, whether unilateral or bilateral.<sup>45</sup>

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<sup>44</sup> I have indicated in this and in the following notes, so far as possible, whether the second contract, that on which the plaintiff was suing, appears to have been unilateral or bilateral. *Shadwell v. Shadwell*, 30 L. J. C. P. N. S. 145 (1860), (unilateral); *Scotson v. Pegg*, 6 H. & N. 295 (1861), (probably unilateral); *Chichester v. Cobb*, 14 L. T. Rep. N. S. 433 (1866); *Skeete v. Silberberg*, 11 T. L. Rep. 491 (1895), (unilateral).

<sup>45</sup> *Johnson's Adm. v. Seller's Adm.*, 33 Ala. 265 (1858), (bilateral). Cf. *Humes v. Decatur L. I. & F. Co.*, 98 Ala. 461, 473, 13 So. 368 (1892); *Ellison v. Water Co.*, 12 Cal. 542, 553 (1859), (bilateral); *Havana Press Drill Co. v. Ashurst*, 148 Ill. 115, 35 N. E. 873 (1893), (promise to perform existing obligation to third party no valid consideration for license to use patent); *Peelman v. Peelman*, 4 Ind. 612 (1853), (unilateral); *Ford v. Garner*, 15 Ind. 298 (1860), (bilateral); *Reynolds v. Nugent*, 25 Ind. 328 (1865), (unilateral); *Ritenour v. Mathews*, 42 Ind. 7 (1873), (unilateral). In this case promise was by surety to principal debtor in consideration of being relieved from liability); *Harris v. Cassady*, 107 Ind. 158, 8 N. E. 29 (1886), (bilateral); *Brownlee v. Lowe*, 117 Ind. 420, 422, 20 N. E. 301 (1888), (general *dictum*); *Barringer v. Ryder*, 119 Ia. 121, 93 N. W. 56 (1903), (promise to perform obligation to a third person held insufficient consideration for a conveyance); *Holloway's Assignee v. Rudy*, 22 Ky. L. Rep. 1406, 60 S. W. 650 (1901), (unilateral); *Ford v. Crenshaw*, 1 Litt. (Ky.) 68 (1822), (in statement of facts stated as unilateral, but in discussion stated as mutual promises); *Schuler v. Myton*, 48 Kans. 282, 29 Pac. 163 (1892), (unilateral, but *dictum* that a bilateral contract also would be invalid); *Putnam v. Woodbury*, 68 Me. 58 (1878), (uncertain); *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 1, 11, 57 Pac. 440 (1899), (unilateral. Previous obligation was as a fiduciary for a third person); *Gordon v. Gordon*, 56 N. H. 170 (1875),



Some American cases, however, follow the English decisions and hold the second agreement valid, and in these cases too, no distinction is taken between unilateral and bilateral contracts.<sup>46</sup> In one decision only<sup>47</sup> has such a distinction been attempted; and in this case the distinction was taken in a dictum based on a passage from Sir Frederick Pollock's work to which the court refers.

The ground upon which the English cases are rested and that on which such American decisions as follow them are also in the main rested, is that the performance to which the plaintiff had been bound to a third person was beneficial to the plaintiff, and the argument of the courts by what is not said as well as by what is said, seems to make plain that these courts regard either the actual doing, or the promise to do such a beneficial act, a sufficient consideration.<sup>48</sup> I confess it is a matter of some surprise to me that the

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(probably bilateral); *Vanderbilt v. Schreyer*, 91 N. Y. 392 (1883), (probably unilateral); *Seybolt v. New York, etc. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75 (1884), (bilateral); *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224 (1889), (bilateral); *Arend v. Smith*, 151 N. Y. 502, 45 N. E. 872 (1897), (unilateral); *Alley v. Turck*, 8 N. Y. App. Div. 50, 52, 40 N. Y. Supp. 433 (1896), (unilateral); *Petze v. Leary*, 117 N. Y. App. Div. 829, 102 N. Y. Supp. 960 (1907), (unilateral); *Sherwin v. Brigham*, 39 Ohio St. 137 (1883), (bilateral); *Hanks v. Barron*, 95 Tenn. 275, 32 S. W. 195 (1895), (unilateral); *Kenigsberger v. Wingate*, 31 Tex. 42 (1868), (unilateral); *Cobb v. Cowdery*, 40 Vt. 25, 28, (1867), (*dictum* as to both unilateral and bilateral); *Davenport v. First Congregational Soc.*, 33 Wis. 387 (1873), (unilateral).

<sup>46</sup> *Humes v. Decatur Land Improvement Co.*, 98 Ala. 461, 473, 13 So. 368 (1892) (bilateral. Recovery allowable only where defendant will be benefited by plaintiff's performance); *Hirsch v. Chicago Carpet Co.*, 82 Ill. App. 234 (1899), (unilateral); *Donnelly v. Newbold*, 94 Md. 220, 50 Atl. 513 (1901), (unilateral); *Abbott v. Doane*, 163 Mass. 433, 40 N. E. 197 (1895), (probably bilateral); *Bradley v. Glenmary Co.*, 64 N. J. Eq. 77, 53 Atl. 49 (1902), (unilateral); *Avondale Marble Co. v. Wiggins*, 12 Pa. Sup. Ct. 577 (1900), (bilateral). See also *Day v. Gardner*, 42 N. J. Eq. 199, 203, 7 Atl. 365 (1886).

<sup>47</sup> *Merrick v. Giddings*, 1 Mackey (D. C.) 394, 410 (1882).

<sup>48</sup> In *Shadwell v. Shadwell*, 30 L. J. C. P. N. S. 145, 148, 149 (1860), Erle, J., who delivered the opinion of the majority of the court after having first suggested that the plaintiff may have incurred a detriment at his uncle's request in performing his engagement to marry, by changing his position relying on the uncle's promise, added: "Secondly, do these facts show a benefit derived from the plaintiff to the uncle at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood, and the interest in the *status* of the nephew which the uncle declares. The marriage primarily affects the parties thereto; but in the second degree it may be an object of interest with a near relative, and in that sense a benefit to him."

Byles, J., rested his dissent mainly on the well founded objection that the plaintiff's marriage was not requested by his uncle as the consideration for his promise,

commentators on these cases have not generally thought it worth while to consider the actual reasons inducing the courts which have

but also said: "Now, the testator in the case before the court derived, so far as appears, no personal benefit from the marriage."

In *Scotson v. Pegg*, 6 H. & N. 295, 299, 300 (1861), Martin, B., said: [The plea "is bad in law because the ordinary rule is, that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him. . . . The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiff had previously contracted with third parties to deliver their order."

Wilde, B., the only other judge delivering an opinion, said, *ibid.* 300: "Here the defendant who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him."

In *Humes v. Decatur Land Imp. Co.*, 98 Ala. 461, 473, 13 So. 368 (1892), the court said: "In the case of *Johnson, Admr. v. Sellers*, 33 Ala. 265 (1858), it is said, 'a promise by defendant to plaintiff, made to induce the latter to comply with an existing contract between him and other persons is without consideration.' We are not disposed to depart from the rule as here stated, but we are not willing to extend it so that if the party making the second contract is directly interested in the result, and is to be benefited, he cannot employ the same party for the protection of his own interest."

In *Hirsch v. Chicago Carpet Co.*, 82 Ill. App. 234, 237 (1899), the court gave as its reasons for upholding a promise given to induce performance by the plaintiff of a contract with the Tivoli company to deliver goods to it, that they "were not outside parties having no interest in the matter. They were the principal officers of the Tivoli company."

In *Donnelly v. Newbold*, 94 Md. 220, 222, 50 Atl. 513 (1901), the same argument is used. "The fact which appears on the face of the guaranty that the appellee was interested in the land which was to be improved by the use of the bricks constituted a consideration sufficient to support the guaranty."

In *Abbott v. Doane*, 163 Mass. 433, 40 N. E. 197 (1895), the court said: "If A. has refused or hesitated to perform an agreement with B. and is requested to do so by C. who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement in consequence of such request and promise by C. is a good consideration to support C.'s promise."

In *Day v. Gardner*, 42 N. J. Eq. 199, 203, 7 Atl. 365 (1886) the court said: "A substantial benefit accrued to her from the payment of the taxes . . . [There was no personal obligation on the promisor to pay the taxes] but if a personal liability had existed, the duty which such liability would have imposed would have been a duty to the government which was entitled to the taxes, and not to the mortgagee, and I am not prepared to say that, in such a condition of affairs, the collateral benefit resulting to a mortgagee from the payment of taxes, which were entitled to priority in payment over his mortgage, would not constitute a perfectly valid consideration for such a contract as that on which the defense in this case rests."

In *Bradley v. Glenmary Co.*, 64 N. J. Eq. 77, 83, 53 Atl. 49 (1902), the same reason is given. "The reduction of the amount due on the first mortgage by the payment on the principal of \$2,000, with all arrears of interest, thereby reducing it to \$7,000, was a direct benefit to the complainant."



upheld such agreements to decide as they have. I conceive the discussion to be well worth while whether benefit to the promisor is not sufficient consideration. That, however, is another story, and I will only say here that I have changed my mind upon this point since my essay on this subject of some years ago,<sup>49</sup> and that now on the ground of legal benefit to the promisor I support the English cases and such American decisions as follow them in upholding the second agreement, whether unilateral or bilateral. My point in alluding to the matter in this connection is to make clear that the cases which uphold the validity of the second agreement apply Mr. Leake's test, as likewise do the contrary decisions. The difference between the two being that the former regard legal benefit given or promised to the promisor as sufficient consideration, the latter do not.

Another class of cases which are inconsistent with the theory which I have attributed to Sir Frederick Pollock and Professor Langdell, consists of bilateral agreements, in which one promise is a promise to pay a debt. It is well settled that such agreements are not binding.<sup>50</sup> These cases are decided on the ground that the performance of the promise to pay the debt involves no legal detriment to one party or legal benefit to the other; and yet the promise if binding would involve a detriment since it extends the period of the Statute of Limitations.

Finally, I regard Mr. Leake's test as the better of the two in question, because, as I have already said, it seems to me intrinsically unreasonable that a promise of an act should ever be regarded as greater value by the law than actual performance of that very act. As the matter has been well put,<sup>51</sup> the contrary view in-

<sup>49</sup> 8 HARV. L. REV. 27.

<sup>50</sup> *Lynn v. Bruce*, 2 H. Bl. 317 (1794); *Ford v. Garner*, 15 Ind. 298 (1860); *Reynolds v. Nugent*, 25 Ind. 328, 329, 330 (1865); *Crowder v. Reed*, 80 Ind. 1, 13 (1881); *Harris v. Cassidy*, 107 Ind. 158, 168, 8 N. E. 29 (1886); *Cuthbertson v. First Nat. Bank*, 138 N. W. 1090 (Iowa, 1912); *Schuler v. Myton*, 48 Kans. 282, 288, 29 Pac. 163 (1892); *Eblin v. Miller*, 78 Ky. 371 (1880); *Jenness v. Lane*, 26 Me. 475 (1847); *Vanderbilt v. Schreyer*, 91 N. Y. 392, 401 (1883); *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562, 575 (1884); *Bryan v. Foy*, 69 N. C. 45 (1873); *Citizens' Nat. Bank v. Marks*, 34 Pa. Sup. Ct. 310, 314 (1907); *Rose v. Daniels*, 8 R. I. 381 (1866). See also *Jones v. Waite*, 5 Bing. (N. C.) 341, 351, 356, 358-359 (1839); *Jones v. Coffey*, 109 N. C. 515, 14 S. E. 84 (1891); *Pruden v. Asheboro & M. R. Co.*, 121 N. C. 509, 28 S. E. 349 (1897); *Ramsey v. Browder*, 136 N. C. 251, 48 S. E. 651 (1904).

<sup>51</sup> Professor Ballantine, 11 Mich. L. Rev. 427.

volves the assertion "that a bird in the hand is worth less than [the same] bird in the bush."

Whatever may be the character of the thing promised, a promise will be of no value unless it is binding; and the rule, though general, that mutual promises *are* binding which promise some act or forbearance, which would itself be sufficient consideration, is not universal. There are other reasons besides lack of consideration which make promises void — notably lack of capacity. The qualification which thus must be made to the definition of consideration in bilateral contracts is as essential to Professor Langdell's definition as to Leake's. Both definitions propose a general test to determine when mutual promises are binding; and neither test can be applied successfully where the promisor lacks capacity, or where for any other reason than lack of consideration the promise is void.<sup>52</sup>

For the same reason a promise in a bilateral agreement which is void for lack of a proper counter-promise to serve as consideration, is itself insufficient consideration, since it is not binding, and is therefore valueless. This is an obvious consequence of the requirement of consideration in bilateral contracts. The principle is ordinarily stated in the axiom that in a bilateral agreement both promises must be binding or neither is binding.<sup>53</sup> In recent years in a few States this application of the law of consideration has sometimes been referred to as if based on some special requirement of "mutuality." This terminology is unfortunate, since it leads to confusion. If anything more or different is meant by saying that mutuality is necessary for the formation of a contract, than by saying sufficient consideration is necessary for a contract, the statement must be deemed erroneous. At best, therefore, the use of the word mutuality in this connection is superfluous; at the worst, it is misleading. It has occasionally led courts to suppose that an

<sup>52</sup> "A promise is a good consideration for a promise. But no promise constitutes a consideration which is not obligatory upon the party promising," per Sanborn, *J. Coldblast Transportation Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77 (1902).

<sup>53</sup> "Either all is a *nudum pactum* or else the one promise is as good as the other." *Harrison v. Cage*, 5 Mod. 4118 (1699), per Holt, C. J. "The promises must be concurrent and obligatory upon each at the same time to render either binding." *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998 (1897); *Simpson v. Sanders*, 130 Ga. 265, 268, 60 S. E. 541 (1908); *Reding v. Anderson*, 72 Ia. 498 (1887); *El Paso, etc. R. Co. v. Eichel* (Tex. Civ. App.), 130 S. W. 922 (1910).



option given for consideration is not binding because the party having the option makes no agreement to perform.<sup>54</sup> This, of course, is not in accordance with the weight of authority or of reason.<sup>55</sup> Moreover, mutuality has a distinct meaning in courts of equity. A contract between an infant and an adult lacks mutuality in this sense and therefore equity will not give specific performance at suit of the infant.<sup>56</sup> Yet, such an agreement constitutes a contract.

It is not essential in order that a promise shall be sufficient consideration that its performance will certainly prove detrimental to the promisor or beneficial to the promisee. A conditional promise is sufficient consideration. The performance of such a promise does not necessarily involve either detriment or benefit, since the condition upon which any action of the promisor is to take place may not happen. But the possibility that the condition may happen, involves a chance of detriment which is sufficient to make the promise valid consideration. If, however, the condition in a promise relates to a matter which has already happened so that if the truth were known to the parties it would be apparent that the promisor really bound himself for nothing, it may be urged that the promise is insufficient consideration. For instance, the buyer and seller of a tract of land supposed to contain a certain number of acres mutually agree that if the amount of land in the tract is less than supposed, a deduction shall be made in the price for each acre of deficiency; while if the amount of land in the tract exceeds what had been understood, a corresponding increase for each added acre shall be made. On a survey being made the tract proves larger than had been supposed. In actual fact, therefore, the seller in promising to pay for a possible deficiency promises nothing, since there was no deficiency, and could be none. Nevertheless, on these facts it has been held that the buyer's promise to pay for the excess was supported by sufficient consideration.<sup>57</sup> So where several heirs agreed after a relative's death, but before the contents of his will

<sup>54</sup> See *Crane v. Crane*, 105 Fed. 869 (C. C. A.) (1901); *Huggins v. Southeastern Lime and Cement Co.*, 121 Ga. 311, 48 S. E. 933 (1904). See also *Long Syrup Refining Co. v. Corn Products Refining Co.*, 193 Fed. 929 (C. C. A.) (1912).

<sup>55</sup> *Vickrey v. Maier*, 164 Cal. 384, 129 Pac. 273 (1912); *Burgess Fibre Co. v. Broomfield*, 180 Mass. 283, 62 N. E. 367 (1902); 40 Am. L. Reg. 327.

<sup>56</sup> *Flight v. Bolland*, 4 Russ. 298 (1828); *Fry on Specific Performance*, § 460; *Professor Lewis* in 40 Am. L. Reg. 270, 319, 383, 447, 507, 559.

<sup>57</sup> *Seward v. Mitchell*, 1 Coldw. (Tenn.) 87 (1860).

were known, that whatever the terms of the will they would divide the estate evenly, the agreement was held binding, although in actual fact those who would receive under the will less than a ratable share were promising nothing in return for the promises of those who under the will would take more than a ratable share to surrender some portion to the others.<sup>58</sup> So a wager on an unknown past event aside from the defence of illegality (which would now be sustained) is a valid contract;<sup>59</sup> and other decisions involving the same principle might be added.<sup>60</sup> Professor Langdell regards these decisions as inexplicable on principle and only to be accounted for by the maxim *communis error facit jus*; but when a decision is founded on common sense it seems better to seek an underlying reason than to ascribe the result to common error, and I think it evident that the law looks at the matter not from the standpoint of universal intelligence but from the standpoint of the parties; and as the law is made for man, not man for the law, this is the only proper attitude. From the standpoint of the parties in the cases referred to above, the risk is as real where the contingency has already happened, but is unknown, as is the case where the contingency has not yet happened.<sup>61</sup> This is not saying that anything is detrimental which the parties think detrimental, but only that where on the facts known at the time of the bargain any reasonable person would think performance of the promise might require an act or forbearance, which the law (not the parties) regards as detrimental to the promisor or beneficial to the promisee, the promise is sufficient consideration.

The result of this argument is that no briefer definition of sufficient consideration in a bilateral contract can be given than this: Mutual promises each of which assures some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any

<sup>58</sup> *Supreme Assembly v. Campbell*, 17 R. I. 402, 22 Atl. 307 (1891).

<sup>59</sup> *Sheppard, Actions*, 2 ed. 178; *March v. Pigot*, 5 Burrows (Eng.) 2802 (1771).

<sup>60</sup> *Barnum v. Barnum*, 8 Conn. 469 (1831); *Rothrock v. Perkinson*, 61 Ind. 39 (1878); *Howe v. O'Mally*, 1 Murphy (N. C.) 187 (1809); *Kennedy's Ex. v. Ware*, 1 Pa. St. 445 (1845). See also *Beckley v. Newland*, 2 P. Wms. 182 (1723); *McElvain v. Mudd*, 44 Ala. 48 (1870); *Curry v. Davis*, 44 Ala. 281 (1870); *Pool v. Docker*, 92 Ill. 501 (1879). But compare *Walker v. Walker*, Holt 328, 5 Mod. 13 (1695); *Harding v. Walker*, Hempst. (U. S.) 53 (1828); *Smith v. Knight*, 88 Ia. 257, 55 N. W. 189 (1893).

<sup>61</sup> *Holmes, Common Law*, 304.



rule of law other than that relating to consideration, are sufficient consideration for one another.

It remains only to consider two special cases which have been thought difficult to reconcile with the theory of consideration which I have advanced. As has been said, it is undoubtedly law that a voidable or unenforceable promise is sufficient consideration to support a counter-promise. One may state the result of the cases on this question clearly. A defense given by law to a promisor enabling him at his option to avoid performance, will not prevent the promise from being sufficient consideration.

I believe that this rule, though wise, must be regarded as an exception to the principles of consideration.

The promise of an infant, an insane person, or one whose promise is for any reason performable only at his option, is not a thing of such value, whatever may be the nature of the thing promised, that the law would ordinarily regard such a promise as sufficient consideration. This may be readily seen by supposing that the terms of a voidable obligation such as the law imposes on promisors of the classes just enumerated, be put in words and then made as a promise by an adult under no disability. It will be obvious that the promise is insufficient to support a counter-promise. Whether the infant's promise be translated as meaning — I promise to perform if I choose, or I promise to perform if I conclude to ratify, or I promise to perform unless I choose to avoid my agreement, — it is clear that the promise is illusory, since its performance is by its very terms at the option of the promisor, and he can exercise this option without incurring a detriment or giving a benefit. The same line of argument is applicable to any voidable or unenforceable promise. That a promise which in terms reserves the option of performance to the promisor is insufficient supports of counter-promise is well settled.<sup>62</sup> And the promise is no more effectual because the condition contained in it is in the form of a condition subsequent rather than a condition precedent. An agreement which one party reserves the right to cancel at his pleasure, cannot create a contract. These cases where promises

<sup>62</sup> *Roberts v. Smith*, 4 H. & N. 315 (1859); *Montreal Gas Co. v. Vasey*, [1900] A. C. 595; *Oakland Motor Car Co. v. Indiana Automobile Co.*, 201 Fed. 499 (1912); *Velie Motor Car Co. v. Kopmeier Motor Co.*, 194 Fed. 324; *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386 (1895); *Lydick v. Baltimore & Ohio R. Co.*, 17 W. Va. 427 (1880).

are held sufficient consideration though the law gives the promisor an unqualified right to avoid them, can be satisfactorily explained on no theory of consideration except that advanced by Professor Ames — that any promise asked for if in fact given is sufficient consideration. And though Professor Ames's theory escapes this difficulty, it is not the theory upon which these cases were actually decided, and, as has been seen, involves such other difficulties when compared with existing law that it cannot be accepted.

Cases where a promisor warrants the truth of existing facts have also been put in opposition to the argument that a promise must in order to furnish sufficient consideration be a promise of something which would if actually given be sufficient consideration for a unilateral contract. It is said:

"I agree that a horse which I sell shall be sound, or shall win a race; or that a man shall pay his debts; or that a ship shall come safe to port: in all these cases my promise is a valid consideration for a counter-promise. Yet the soundness or speed of the horse, the solvency of the third party, or the safety of the ship could not be a valid consideration for a promise made to me."<sup>63</sup>

Here, however, there is no inconsistency or exception. A warranty or promise of the truth of an existing fact can only be understood as meaning a promise to be responsible in damages if the fact asserted is not true. The warranty of the existence of an event in the future when construed means either a promise to bring about the existence of the event or a promise to pay damages if the event does not happen, and either the present causation of the fact or the present payment of damages<sup>64</sup> for the unsoundness or lack of speed of the horse, the insolvency of the third party, or the loss of the ship would be as sufficient consideration as the promise of warranty.

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<sup>63</sup> Professor Beale, 17 HARV. L. REV. 82.

<sup>64</sup> See Holmes, Common Law, 299. The distinguished author's extension of this construction to all contracts seems erroneous. It is merely a question of fact whether a promisor agrees to "take the risk" of an event happening (that is to pay for the consequences if it does not happen) or agrees to cause it to happen.



## THEORIES OF WATER LAW.

LIKE other things of general concern, water has been the subject of much legal thought, and different theories have been worked out. It appears therefrom that possible theories of water law take form according to certain underlying ideas. In this paper I will compare these ideas and the systems which grow out of them.

Existing or proposed systems of water law have one first elemental principle for all of them. In the beginning they have the same root in their attitude to running water as a physical substance. It is the idea that water running in streams and watercourses is not of itself the property of any person and cannot be. Although differing with regard to the regulation of the use of the water, yet the water itself, by all of them, and by probably all people, is considered not to belong to any person. This is expressed at the beginning by the Roman jurists, in the compilation of Justinian, as follows: "By natural law these things are common to all: the air, running water, the sea, and as a consequence the shores of the sea." In the same class are placed the wild animals of the forest, fish in the sea, gems on the seashore, the sea-water, rain and so on. They are under no man's domain in their wild state, and hence can be no man's property while in their original condition. In the terms of logic, they are "outside of the universe of discourse" when property is mentioned. They are *not* property, or, as has been said, they are in the "negative community." This is sometimes phrased that they "belong to the public" or to the "state in trust for the people." The Civil Code of California, § 1410, now uses the expression that waters "are the property of the people of the state." But for present purposes I only want to point out that all systems of water law adopt the elemental idea that running water while in its natural situation is not owned; that the law regulates the use of it, but that rights of flow and use are what the law recognizes, and not property in the water itself. The water itself is "common" or "*publici juris*." This is accepted to-day by courts, legislatures, and publicists alike. In the follow-

ing discussion I will use the phrase that running water is "common to all."

Developing from this foundation are certain possible systems of water law. The first which I will consider is what appears, at first glance, the most natural one; that is, the rule whereby everyone, like the beasts in the forest or the Indians on the plains, may take out freely from springs and streams what he wants, and that the first so to do shall have a prior right to continue to do so. This law of "Prior Appropriation," as it is called, is the chief law in the states west of the Mississippi Valley. It had its beginning in the early days of the state of California, when the region was an uninhabited frontier presenting a condition close to the primitive condition of the wild animals in the forest and the Indians on the plains. It was all an unowned, unclaimed and unguarded wilderness of vast extent, where everything was new and theretofore no rights existed. The California miners diverted streams from one locality in the wilderness where there was no mining to another locality where there was mining, and used the water for washing out the gold and for supplying the purposes of mining camps. From California it spread to other frontier regions, such as Nevada, Oregon, Idaho, Utah and so on, and came into application as the earliest system of water law in the West in any of these states.

Under this system the idea of a water-right was an idea of having possession of a portion of the flow of the stream. It was to protect the first possessor. It was called a possessory right and had the features of a possessory system. It was initiated by taking possession of a portion of the flow of the stream (that is, by diverting and carrying it to the place of intended use). The measure of right was the capacity of the ditch, as that measured the portion of flow taken into possession and for which his continuance in possession was to be protected. The point of diversion could be shifted up or down the stream, and was not fixed at any place. Nor could it be lost by non-use alone without relinquishment of the possession; the law allowed him to do what he willed with his own, and therefore he could abandon his possession if he chose, but it rested upon his own wishes in the matter, so long as he held possession. The foundation was his right to be protected in his possession simply because he came there first. Subsequent years



have been more careful in conditioning possession upon beneficial use, making actual use rather than capacity of the ditch the measure of it, and the place of use a permanent condition of it, and non-use a self-sufficient cause of loss of it. Still, so long as he continues his use, the prior appropriator has the better right to-day under this system and must have where it prevails. Priority is still the foundation of it. It is based upon the idea that water titles must be secure and certain. The system is secure and certain for the prior appropriator, and, while it gives much less security to the subsequent one, certainty in one respect is given to him also, namely, the certainty that he will get nothing until the prior rights are fed.

The system is eminently a pioneering system. It developed California and neighboring states, and is developing Canada and Australia, where it is also in force. The pioneer gambles for high stakes, and if the rewards are limited he won't begin the game and put much money in it. The law has said to the pioneer, "Go take the water and make the farms fruitful and develop the mines and the water powers, and you shall always have the first right in the stream." He has accepted the offer, invested his capital, planted his land and is reaping his harvest.

When, however, full appropriation has been reached, priority diminishes the number of uses thereafter. The days of the pioneer have gone very largely — certainly the days of the individual pioneer with small-scale operations. Pioneering to-day is done more with the capital of New York, London and Paris than by frontiers-men with pick and shovel for their own private account. When, fifty years ago, a man appropriated water for his farm, from a stream of any considerable size, he left a surplus in the stream for others to appropriate; but to-day there are hundreds of appropriators on the most considerable sources of supply, and when another comes along on such streams he threatens the security of those who have gone before. This is already a common situation upon many western streams. I do not in this refer merely to the notices of appropriation of which so much has been said in the press. Those notices plaster the streams of California and probably throughout the West from source to mouth, and are mostly lapsed long ago. I refer by "appropriation" to actual diversions now in actual use, and this actual use, say the courts of a number of

states, has exhausted the supply of many of the large streams already.<sup>1</sup>

The question then becomes, what is to be done for the future where the streams have been wholly appropriated and put into use? Under the law of prior appropriation, so long as unmodified, appropriation itself comes to an end. Instead of carrying out the primitive idea that the water is *publici juris*, or the common property of all, it overthrows that idea by giving its use exclusively to those who have appropriated the water in the first place. Instead of being open to free use, the door is shut to all who have not already passed in. And indeed as between those already within the door, if a shortage now comes, even their numbers are cut down. The earliest appropriators are protected against the later, although, as the Supreme Court of Oregon has put it, it may be the lion's share, and none may be left for those who come later.<sup>2</sup>

The idea of common right, however, would require the deficiency to be apportioned among existing users at least. Let us consider it first as between existing users, those already within the door. Take a case where a stream has been settled upon for a generation and is in full use, where all use the water economically and a dry season comes. They look over the forgotten records and get the gossip of the old-timers and find that ten or twenty owners can establish priority. These get their full supply (the shortage leaves no supply after them) and one hundred or more others see their crops waste away while the favored ten or twenty mature beautifully. Under the law of prior appropriation this has happened many times in Southern California. This is hardly fulfilling the idea of "common right" with

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<sup>1</sup> "All the waters of the South Platte River have been appropriated, and the entire normal flow of the river is inadequate to supply the priorities for irrigation purposes already decreed from it." *Comstock v. Ramsay* (Colo.), 133 Pac. 1107 (1913).

Many Colorado streams are already over-appropriated, says the court in *Humphreys T. Co. v. Frank*, 46 Colo. 524, 105 Pac. 1093 (1909). The entire Boise River in Idaho has been appropriated, says the court in *United States v. Burley*, 172 Fed. 615 (1909).

"The rapid increase of the irrigated area, adjacent to the watercourses in every part of the state has drawn so largely from our water resources that from some streams permits can no longer be granted, and upon several others only after storage has been provided as a supplemental supply for at least a part of the season." Report of the State Engineer of Wyoming, 1911-1912, page 15.

<sup>2</sup> *Caviness v. LaGrande Irr. Co.*, 60 Ore. 410, 119 Pac. 731 (1911).



which the law begins. It is certainly not a system of common right that one hundred farmers along the stream suffer for water while ten or twenty farmers get it all. To follow out the idea of common right in such case the water, instead of going to the earliest appropriators, would be apportioned among all existing users of it.

Should this apportionment be made? If it is, the principle of priority is seriously cut down. And this principle of apportioning deficiency among existing users, which is in direct opposition to priorities, presents a distinguishing feature of the second system of water law. This second system is the common-law system, and gives rights in a stream ratably to all persons owning land along the stream, and recognizes no priorities in anyone. It is the system known as Riparian Rights. According to both the civil law of Europe and our common law, all whose lands border upon a stream have equal rights to have the benefit of the water supply. Superabundance of water allows each such owner to make the fullest use he pleases on his bordering land; but when there is a deficiency the common law is a system of enforcing apportionment thereof. These bordering landowners, or "riparian owners," share the water ratably and no one of them gets a preference over the others in the eye of the law. While the system of prior appropriation is a system of exclusive rights whereby the prior appropriator may exclude all others to the extent of his priority, the common-law system is one of correlative rights, as it is called, whereby the rights of landowners bordering upon the stream are interdependent and adjustable or relative to each other, so as to put them upon an equal footing in times of deficiency.

Which system is preferable between existing users? Unquestionably it can be answered that for pioneering the first system is preferable. The pioneer gambles for high stakes, and unless those large stakes are secured to him after he succeeds, he will not gamble, and there would be no pioneering. Besides under a correlative system, based upon the obligation to share the supply, there is an inherent uncertainty among all as to how much will be theirs in the apportionment of a deficiency.<sup>3</sup> The pioneer has a right to

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<sup>3</sup> "The extent of a riparian owner's right to the use of water for irrigation is necessarily indefinite, uncertain, and subject to fluctuations, as it must always be dependent upon the future like needs of other riparian owners, as there can be no priority of right between them, and no riparian ownership of a definite amount of water

say, "Take away my water, and the land for which I braved hardships will revert to a desert." And this complaint of the pioneer cannot be denied.

But if we look at streams already developed by many users, after the pioneer has passed away, we find a community of farmers to whom dates and order of settlement along the river are ancient history and largely forgotten. The successor of the oldest user may say, "Cut off the water for one year, and my land will revert to a desert." But it sounds otherwise now, because, of course, the law of prior appropriation does not prevent that reversion to desert. Land reverts to desert upon shortage of water under every law; the only thing the law of prior appropriation does is to visit the loss wholly upon the subsequent appropriators, who now constitute most of the water users.

Still, western lawyers and engineers will almost unanimously declare for the enforcement of priorities. In the first place they say that the hardship and loss to the later users in such cases do not come from injustice, but come from nature withholding its full supply that year, and nature is far more cruel than man; that the subsequent users, having taken rights dependent upon nature for their existence, must blame nature and not man when the bounty is withheld. But to me that is not valid upon well-settled streams, after pioneer conditions have disappeared, and when priority becomes only a technicality which is forgotten except in times of trouble. Water is a common necessity of the community which a given source of supply serves, and it is neither practical nor desirable to tell people to keep away from using water supplies unless they know for certain that a dry year will never come. People will and should use all the water there is in normal years, and industry cannot stand still, shrinking at some unforeseen calamity in the future. No blame can be justly attributed to the later users.

However, any idea of forcing apportionment or sharing deficiency to secure equality is held to mean confiscation of the priorities of the prior appropriators, if they were thus forced to share with later ones when a deficiency comes. To attempt it would, it is sometimes said, cause an uprising. Such doctrines taken hold

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as against other riparian owners." *Little Walla Walla Irr. Union v. Finis Irr. Co.*, 62 Ore. 348, 124 Pac. 666 (1912).



of by politicians could, indeed, become dangerous, however promising to the needy. We are not ready to see all men leveled to the same state in life, living by set form, and kept down to like fortune by public force. But it does not seem that the doctrine of apportioning deficiency of water is an extreme doctrine of that kind (if we omit the assumption that it would fall into bad hands), in view of the simple fact that it is the doctrine of the most widely applied water law of any — the common law of riparian rights. It is applied in this country, except in the far West, and applied in England, and also in countries which have drawn their law from the Code Napoléon. So far from being arbitrary and confiscatory the doctrine of the common law was early said by Justice Story (in a case where he decreed an apportionment) to be merely a rule for the public convenience and general good,<sup>4</sup> while in a Texas case, for example, this common-law system was said to be "but the rule of universal right and common justice, and stands in need of no sanction to give it authoritative force."<sup>5</sup> Since, consequently, apportionment in times of deficiency has been acquiesced in by a large part of the world, I suppose it could be peaceably done with us. Some forcible expressions to that effect have been made with reference to appropriation.<sup>6</sup> It has also been made the basis of actual decision as between appropriators by Judge Morrow of the United States Circuit Court of the 9th Circuit.<sup>7</sup> This case involved a stream flowing from California into Nevada, which had been very early settled upon. The users were numerous, and the records were in confusion. To have attempted to sift out the priorities between the various appropriators, situated in two states, would have been a very large task and not wholly possible, and when done would

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<sup>4</sup> *Tyler v. Wilkinson*, 4 Mas. (U. S.), 397 (1827).

<sup>5</sup> *Fort Worth, etc. Co. v. City of Fort Worth* (Texas), 158 S. W. 167 (1913).

<sup>6</sup> The Supreme Court of the United States said in a frequently quoted passage in *Basey v. Gallagher*, 20 Wall. (U. S.) 670 (1875): "Water is diverted to propel machinery in flour mills and sawmills, and to irrigate lands for cultivation as well as to enable miners to work their claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say *within reasonable limits*, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood of its use, and vest an absolute monopoly in a single individual."

<sup>7</sup> *Anderson v. Bassman*, 140 Fed. 14 (1905).

have left a large number of users without water. Judge Morrow consequently apportioned the water among all, without regard to their priorities, expressly saying that in his view the question of the priorities of the original settlements along the river was unimportant. The Supreme Court of California has adopted this as the rule for underground water.<sup>8</sup> Likewise, as between consumers of water for irrigation from public service distributing canals, the Railroad Commission of California has adopted the rule of apportionment in times of deficiency.<sup>9</sup> And likewise, also, there is the application to appropriators of the principle of "rotation," whereby each appropriator is assigned the entire flow for a period of time. His priority is recognized to the extent of giving him more or less of the time, but is disregarded in so far as priority, if fully enforced, would give the prior appropriator his full amount at all times, without reference to the needs of others. Rotation is going into practice among appropriators with the sanction of such courts as the Supreme Court of California, the Supreme Court of Idaho and the Supreme Court of Oregon.<sup>10</sup> So that the doctrine of making exist-

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<sup>8</sup> "The objection this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among a large number of users, is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but if the rule is the only just one, as we think has been shown, the difficulty in its application in extreme cases is not a sufficient reason for rejecting it and leaving property without any protection from the law." *Katz v. Walkinshaw*, 141 Cal. 136, 74 Pac. 772 (1903).

<sup>9</sup> "It is also well established in this state, contrary to the doctrine of most of the other Western states, that in the case of a public-service water company, at least as between consumers of the same class, there is no priority, and in times of shortage, the supply of water must be ratably apportioned." *Palmer v. Southern California, etc. Co.*, 2 California R. R. Commission Decisions, 43.

<sup>10</sup> The Supreme Court of California in *Hufford v. Dye*, 162 Cal. 147, 121 Pac. 400 (1912), said: "If there is not water enough (and this appears to be the fact) to permit a diversion of the stream and a simultaneous use of part by both parties without injury, the court may by its decree fix the times when, by rotation, the whole may be used by each at different times in proportion to their respective rights. In doing so, the court should recognize the paramount and primary right of the respondent to the first flow in a full ditch during the irrigating season as it may be required. . . . While this remedy of rotation and use of waters for irrigation purpose has been more generally applied as between riparian proprietors, in principle there is no reason why it should not be made applicable as between claimants by appropriation. It is applied between riparian owners to permit the beneficial use of the waters by all, and as by appropriation only the right to a beneficial use is acquired, there is no reason why, when it can be justly made applicable, the same rule of rotation should not be applied as between appropriators." See also *State v. Twinn Falls Co.*, 21 Idaho 410, 121



ing appropriators' rights correlative, carrying apportionment in times of deficiency, is going on in conservative courts without causing disturbance, and, rather, with approval.

Conceding then, as it seems we must, that the idea of apportioning deficiency among existing users has nothing inherently dangerous, a serious question arises whether it would not, in practice, work back to the basis of priority of its own accord. A cogent illustration might be put. Assuming that the reader favors correlative apportionment on the lines just discussed, this case may be put. Suppose a water supply enough in dry years for 1000 acres. Suppose, for illustration, riparian rights did not exist. One hundred men take out the water and use it on 1000 acres. They plant trees and vines, and after six or seven years they have profitable farms and support their families in comfort. A few wet seasons ensue and the supply doubles. Along come 100 more men, who take the increase and use it on 1000 acres. The result would be that when the dry years come they would continue to take half of the water, depriving the first-comers and killing half their trees. After half their trees are killed again there would be but 1000 acres watered, but now divided among 200 families, twice the former number. None of them would again plant more acreage in trees, even in wet years; one loss of half their fortune would be lesson enough. So that where, before, there were 100 families with 10 acres each, there are now simply 200 families with 5 acres each. Assuming that originally it required 10 acres to support a family, then the 5 acres each now has would not do it. There would be a struggle for existence, the weaker would sell out, and in a few years 100 men would again have 1000 acres wet and 1000 acres would be dry. Human nature is so constituted and the strife for land is so fierce that this discounting process would inevitably take place. It is simply a matter of time until the scheme of apportionment defeats itself in practice.

This is a serious consideration. The picture is a true one and the conclusion cannot be denied. But, as put, it is not a normal case, and hence not an illustration of general application. It is not normal because it involves two assumptions that are out of the normal; that is, first it assumes unusually wet years to

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Pac. 1039 (1911); *Cantrall v. Sterling Mining Co.*, 61 Ore. 516, 122 Pac. 42 (1912); *McCoy v. Huntley*, 60 Ore. 372, 119 Pac. 481 (1911).

begin the illustration, and second a *cycle* of dry years to finish it. For a general illustration it should begin with assuming normal years rather than unusually wet years. We will then be considering only the users of water who were drawn there by the normal supply. The number of users would not be swollen by unusual conditions. We should also finish without assuming a prolonged cycle of dry years, as shortages do not go over a year or two as a rule. We have had cycles of dry years, lasting ten years or so, but that is exceptional. Apportionment may still effectually carry over a single dry year, or even two dry years. I rather think the movement of farm ownership is not so quick as that, and in the ordinary run of cases the normal supply will have returned before much change of ownership has resulted; so that I think apportionment of deficiency would work out as intended, oftener than it would defeat itself, — among appropriators from streams, just as much as among riparian owners, users of percolating water, and consumers from public-service canals, in all of which cases the rule of apportionment is now the law of California, at least.

For the purpose of this discussion, however, I do not undertake to further press either side of the matter. It has served to bring out the first aspect of the difference between the system of prior appropriation and the common law system of riparian rights, namely, that between existing users the former gives exclusive prior rights to the prior appropriator and his descendants and successors, while the latter is a system of correlative rights between all landowners along the stream without regard to priority.

To pass on, I assume, for the purpose of carrying the matter to new ground, that the correlative system is taken as preferable upon full-settled streams, and that the law of prior appropriation is being modified to enforce a pro-rating of the supply among existing users in times of deficiency. By this modification, the idea of "common right" in water with which the law of prior appropriation started out, but seemed to contravene in times of deficiency, is to a considerable extent revived and given continued force, but yet not to the fullest extent of the matter, because it has still left out the idea of new parties getting new rights in the stream. Even if existing users are placed upon an equality instead of priority, the water will still be devoted to only a comparatively small part of the community living within the drainage region. If the water



is common to all, then, to carry out the idea of common right consistently, newcomers would have to be admitted to the use of the common supply, even though the supply is already in full use by others. The others would have to give up *pro rata*, and apportion some to newcomers. This has never, so far as I can now recall, been advocated, as between appropriators, anywhere in the West. On the contrary, it has been strongly condemned and ruled against, both in the courts and by others.<sup>11</sup> It would be bare socialism if it were extensively done. Nevertheless, the idea of "common right" in water is not complete unless it is done, and for developing the discussion I will consider what would be the result if it were done.

Suppose that we intend to force an apportionment of the supply of existing users, in order to admit new users into an already fully used supply. We immediately meet the obstacle that the newcomer, desiring to exercise the common right in water, must have some means of getting at the water. If he owns no land bordering thereon, he must cross the bordering land of others to get there. Streams, of course, are wholly enclosed from source to mouth by somebody's land. There is no land in the state without some owner.

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<sup>11</sup> "To compel such a subdivision and distribution of water supplies as this construction would entail, would destroy the value of all water-rights. In this state the water supply is so small that large areas must go without irrigation entirely. Such water as there is must be applied, so far as it will go, in quantities sufficient to make the lands profitably productive. The principal benefit of irrigation comes from its use in growing vineyards and orchards. These require a large expenditure and a permanent water supply to make them profitable. *If those engaging in such enterprises know that they must be ready always to divide their water supply with those in the vicinity who may subsequently choose to engage therein*, such enterprise would be discouraged, the development, growth and progress of the state would be much retarded, and its productive capacity greatly decreased." *Thayer v. California Development Co.*, 164 Cal. 117, 128 Pac. 21 (1912).

"This commission should take good care that, until these applicants improve their system, they admit no new domestic consumers except on the terms indicated, and that they admit no more irrigation consumers whatsoever. This is the kind of priority to which (we have heretofore held) being a member of a class for which a public use of water is created entitles such member of such class, *and he should be absolutely protected and his supply never diminished by additions to the class*, but merely by necessary and unavoidable failure of supply." In the matter of the application of Murray and Fletcher, 2 Cal. Ry. Com., 464 at 524.

The Railroad Commission had a *statute* passed thereafter confirming its power to make such order. Cal. Stat. 1913, Ch. 80, § 5. See *Mordecai v. Madera Canal Co.*, Cal. R. R. Com. Dec. No. 11116, decided December 5, 1913.

That owner may be a farmer, or landed estate. It may be the United States, whose public domain covers one-half of California. Consequently the newcomer, demanding to be admitted into the use of the stream, if he owns land separated from the stream by the land of some other person, must get permission from that other person to cross the intervening land to get at the water that is to be apportioned to him. He must buy a right of access to the water in order to be admitted into a share of the common supply. To hold otherwise would mean not only "common right" in water, but common right to build ditches over anyone's land, and would mean common right in land as well as water. So long as there is individual property in land, this must be absolutely repudiated, and although it was once flirted with in Colorado, it is now disallowed there and in all other states, even those such as Colorado and Idaho, which have talked most of an ideal system of absolutely free enjoyment and appropriation of water. As a late example merely, I quote from the Supreme Court of Idaho:

"It is the appellant's right, by reason of his ownership of the land, to have exclusive possession of said land, and said owner is protected against any right that is attempted to be acquired by trespass thereon in the way of an attempt to appropriate the water running across said land, and neither the respondent nor any other person can divert such water without entering upon and leading it across the lands of the appellant, or using the lands of the appellant in distributing the power created by the use of such water, and committing a continuing trespass upon the premises of the appellant."<sup>12</sup>

Therefore, no matter what the law of waters may try to give, persons owning no bordering land of their own rest for an essential (the right of access) upon what they can buy, not upon common right. What they have is inextricably bound in with purchase; the law of common right in water is helpless to include them of its own force.

But the people bordering upon the stream are under no such impediment. They have natural access by force of their natural situation itself. The stream is right there for them to get at, and the common right in water is available to all of them without hindrance. As a system of law of "common right," then, carried to

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<sup>12</sup> *Marshall v. Niagara etc. Co.*, 22 Idaho, 144, 125 Pac. 208 (1912).



its conclusion, the owners of the enclosing bordering lands must be admitted as of common right at any time, and they exhaust the persons for whom admission can be demanded as of common right.

This is what takes place under the riparian system. The riparian system, regarding all landowners bordering upon the stream as upon an equal footing, enforces the admission of riparian owners, into the use with other riparian owners, although the one to be admitted never before used the water, and no matter how long he had failed to use the water (except, of course, in cases of prescription). And likewise the common law excludes non-riparian owners no matter how long the opposing riparian owner has failed to use the water himself. The common law keeps out non-riparian owners because there is no common right in land to give them access to the stream, and it forces the admission of riparian owners at any time, even though the supply is already in full use by other riparian owners, because they are on an equality with each other, and non-use is in either case immaterial. The riparian owners get the water as of common right, and what is of common right may, of course, be enjoyed at any time.

Is the riparian law socialism? The riparian law not only apportions deficiency among all existing users, but also forces admission into the use of future new riparian users at any time. It places all users upon an equality. Prior appropriation, on the other hand, is every man for himself, and is individualism in the highest degree. Is the riparian doctrine socialism? It certainly presses the idea of "common right" to its completion, and could not extend further in that direction so far as the water is concerned. It could be extended only by introducing "common right" in land too.

The riparian system has met with a flood of denunciation in the West. Half the Western courts, under what is called the "Colorado doctrine," have rejected it absolutely, calling it a "phantom" and the like, and part of the water bill now pending in California aims at abolishing it. Part of this loathing, one might almost call it, is due to its distortion when applied in an unsettled region, especially where there are large holdings of bordering land in a few hands, as in the case of Mexican grants in California. Such abnormal situations twist the system and make it as exclusive for a few owners, even though not using the water, as prior appropria-

tion ever could. But that is an opposition to the ownership of such large landholdings, rather than to the system as one of water law, and but a repetition of the denunciation of those land grants themselves.<sup>13</sup> In great part, however, the denunciation is also due to the sharing feature which forces the admission of new users into an already fully used supply, as a matter of common right, resulting in a permission of non-use at any time. Engineers say that they can plan no works when they cannot know how much water the law will allow them, because they will have to share it with other landowners along the stream who are not using it now but may start to do so in the future at any time. This side of the opposition, at least, seems to me to show that if the riparian system is bad, it is in some degree because socialism is bad.

As between these two systems, prior appropriation and riparian rights, the chief differences have now been brought out. Prior appropriation is every man for himself, with exclusive rights for the earliest and his descendants and successors, refusing to admit the public by any common right into an already fully used supply, and refusing even to apportion any deficiency among existing users to the derogation of the first in priority. The riparian system, on the other hand, carries "common right" in water so far as it can without introducing common rights in land also, and to all bordering or riparian landowners (excluding all non-riparian owners) gives a common right in the supply for use upon those lands, admitting any of them into the use although he had permitted his right to remain long in non-use, and even though thereby cutting down prior users in order to admit him; and, as between existing users, makes them bear ratably the loss when a deficiency comes.<sup>14</sup>

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<sup>13</sup> "Since this country became a part of the United States, these extensive rancho grants, which then had little value, have now become very large and very valuable estates. They have been denounced as 'enormous monopolies, principedoms,' etc.; and this court has been urged to deny to the grantees what, it is assumed, the former governments have too liberally and lavishly granted. This rhetoric might have a just influence, when urged to those who have a right to give or refuse. But the United States have bound themselves by a treaty to acknowledge and protect all *bona fide* titles granted by the previous government; and this court has no discretion," etc. Mr. Justice Grier in *United States v. Sutherland*, 19 How. (U. S.), 364 (1856).

<sup>14</sup> In California both systems exist in this way: The riparian system is enforced for all bordering private landowners who choose to avail themselves of it. But, by federal statute, it is not in force for land of the United States, which comprises half of the area of that state, nor is it enforced for any riparian owners who do not seek it;



These two systems, one of which divides the supplies in severalty according to priority, and the other of which retains the supplies in common undivided, are comprehensive, and any new system can be but some variation of those ideas. The new system now being proposed is the licensing system. It involves mainly the system of prior appropriation, with conditions placed upon the acquisition of new priorities. This is already in force in numerous states. Some of the conditions are the payment of license fees, the making of reports to public officials, and the termination of the priority thereafter, as the public officials from time to time deem advisable. Such licensing system was enacted by the last California legislature,<sup>15</sup> and is now awaiting referendum vote. At bottom, the statute is based upon the idea of priority, and requires the officials to recognize priority to a very large extent; on the other hand, it recognizes that the doctrine of priority has, in some respects, worked unsatisfactorily and so as to require restriction of its operation.

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and from lack of acquaintance with it and other reasons not necessary to go into here, riparian owners very frequently ignore it. Under such circumstances the first to take the water away is prior in right against everyone except the riparian owners, and priority governs among such appropriators, and prior appropriation thereby goes on among appropriators quite actively, and after five years often bars the riparian owners themselves by prescription. But that, if called upon within the prescriptive period, California courts will enjoin the appropriator at suit of a riparian owner, and that the California courts will force the admission of a riparian owner into the use with other riparian owners even though he has not used the water for many years, see, merely as the most recent decision, *Miller & Lux v. Enterprise C. & L. Co.*, S. F., No. 6061, decided December 20, 1913. Since this was written a rehearing has been granted, but not affecting the general principle. These principles have also been incorporated into recent rulings upon underground water. *Burr v. Maclay Rancho & W. Co.*, 154 Cal. 428, 98 Pac. 260 (1908).

<sup>15</sup> Stat. 1913, p. 1012.

## JURISDICTIONAL LIMITATIONS UPON COMMISSION ACTION.

## I.

**S**PEAKING generally the problem which arises in all cases where the question of the limits upon the jurisdiction of a commission is raised, is whether there is warrant of law for what is being done. To determine this is seldom as simple a matter as the reading of the statute under which the commission is purporting to act to see whether by proper interpretation sufficient authorization appears. If there is any doubt as to whether the power in question may constitutionally be conferred upon the commission, that question must carefully be considered. The action of a commission is fundamentally limited by these two possibilities — either that the legislature has not gone as far as it might in empowering the commission, or that the legislature has gone further than it constitutionally may in attempting to give the commission authority. This distinction is sometimes obscured by the canon of construction to the effect that, where a statute is apparently of such extent as to be unconstitutional, it will, if it is a possible interpretation, be confined to that scope which could constitutionally be covered. But when the legislature has gone so far as to make such an assumption impracticable, our courts will promptly exercise their traditional power of regarding as naught governmental action without constitutional power. It so happens that there have been in the Supreme Court of the United States of late years a remarkable sequence of cases concerning the jurisdictional limitations upon commission activity, most of them relating to the extent of the powers conferred upon the Interstate Commerce Commission by the Act to Regulate Commerce as amended. These cases have such importance in actual practice, in addition to the progress they indicate in administrative law, that the present paper will be primarily devoted to the discussion of their bearing upon the fundamental principles of governmental regulation.



## II.

The right of the State to regulate those businesses in which the public has an interest has come down to us from time immemorial. The way in which this principle finds scope most obviously is by the action of the courts in declaring the conduct of the proprietor of the service unreasonable at the suit of the party who has been aggrieved thereby. But legislation laying down rules in first instance for the course which those who assume these callings must follow has always been regarded as due process of law, if it kept within the bounds of what is rational. All this was fully recognized in the leading case of *Munn v. Illinois*,<sup>1</sup> in disposing of the contention strongly urged that the power over rates was essentially judicial, and could not be exercised by the legislature. But the court in its line of argument fully justified regulation in every way that the State may employ to impose obligations. Litigation determines rights and wrongs in the past upon the basis of an existing law; legislation prescribes rules for the future as to what shall henceforth be the right and wrong in a given situation. Declaring past charges unreasonable is an act judicial in its character; fixing rates for the future on the other hand partakes of legislation. All the time it should be remembered that this is public policing of private ownership, even if it be a public calling peculiarly subject to state control. The function of the government is therefore that of regulation of the conduct of the business; the commission should not go into the management of the business by unnecessarily dictating as to the exact course which should be pursued.<sup>2</sup>

Once the principles upon which the obligations of those who are held to the service of the public are established, the enforcement of the law may be devolved upon a body duly established for that purpose. The laying down of the law is something that the legislature cannot delegate; but the execution of the law it almost

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<sup>1</sup> 94 U. S. 113 (1876).

Note the limitations upon this doctrine in *Lake Shore & M. S. Ry. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565 (1899).

<sup>2</sup> In *Bacon v. Boston & M. R. R.*, 83 Vt. 421, 77 Atl. 858 (1910), it was laid down that, although the legislature has power to provide by establishing a commission that a railroad shall discharge all its public duties, powers conferred are only those of supervisor and regulation, and not of management and administration.

necessarily gives over to the officials which it authorizes to act in the matter in question. Notwithstanding any theoretical division of the powers of government, our books have at all times been full of statutes, unquestionably valid, in which the legislature, after laying down rules and principles, has been content to leave the execution and detail to other officers. All this came to the test of the Supreme Court in the Railroad Commission Cases,<sup>3</sup> where the establishing by the legislature of a commission with power to fix rates was held constitutional. The requirement that the rate shall be reasonable is to be found in the law of the land which can only be modified by the process we call legislative. But the function of regulating commissions in determining and fixing reasonable rates and practices, within the principles and limitations of the substantive law governing the situation, is what we call administrative. As a matter of government it has been found, particularly of late years, that the only practicable way of enforcing the elaborated law of public service is by the creation of administrative bodies specially empowered for this particular work. Indeed with the increasing complexity of our relations the power of the legislature to act through bodies skilled to meet the exigencies of the situation as they arise has been universally recognized.<sup>4</sup>

The fundamental rule against delegation of legislative power remains; only it is realized that the application of the principle laid down by the legislature is simply administration. Very recently this distinction was clearly made in the Supreme Court in the case of *Interstate Commerce Commission v. Goodrich Transit Company*,<sup>5</sup> where the objection was raised in vain that certain orders of the commission relating to accounting created in effect new obligations not imposed by the statute. The Congress may not delegate its purely legislative power to a commission, said the Supreme Court, but having laid down the general rules of action under which a commission shall proceed it may require of that commission the application of such rules to particular situations,

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<sup>3</sup> 116 U. S. 307, 6 Sup. Ct. 334 (1886).

See further the limitations in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047 (1893).

<sup>4</sup> In the recent case of *Louisiana & P. R. R. v. United States*, 209 Fed. 244 (1913), it was pointed out that for a commission to draw up what would amount to a code applicable to a situation would be to transcend its powers, its true function being administrative, not legislative.

<sup>5</sup> 224 U. S. 194, 32 Sup. Ct. 436 (1912).



and the investigation of facts with a view to making orders in a particular matter within the rules laid down by Congress. In Section 20 Congress has authorized this Commission to require annual reports, and the Act itself prescribes in detail what these reports shall contain. In other words Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so conferred. This, as the court concluded, is not a delegation of legislative power; it is proper administration of a general statute, proceeding upon the principles therein laid down.<sup>6</sup>

When we come to deal with the constitutional complications due to our federal government, too wide a field is opened for anything but reference here. But such a decision as *Simpson v. Shepard*<sup>7</sup> goes far toward making it possible to get at the principles involved. In this Minnesota Rate Case it was laid down that for normal cases the rule was as simple as that there should be federal regulation for interstate rates and state regulation for intrastate rates. The rule may be simple, but its application is accompanied by so many computations based upon assumptions beyond the possibilities of proof as to make it all but impracticable. However, as the Supreme Court points out, whenever Congress judges that the proper regulation of interstate commerce requires that a federal commission shall have power also over the intrastate rates, by such express legislation the interstate commission may be given exclusive jurisdiction over the rate situation. Until that time comes, there is no implication from the establishing of the jurisdiction of a commission over interstate rates sufficient to take from the states the power to fix intrastate rates by such means as they may choose to employ.<sup>8</sup> But it

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<sup>6</sup> The late case of *Kansas City Southern Ry. v. United States*, 231 U. S. 433, 34 Sup. Ct. 125 (1913), goes even further than the case discussed above in support of the power of the commission under this section.

<sup>7</sup> 230 U. S. 352, 33 Sup. Ct. 729 (1913).

<sup>8</sup> In *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 653 (1912), it was pointed out that, notwithstanding the fact that under the Interstate Commerce Act as it then stood the Interstate Commerce Commission had been given no power by Congress to deal with port proportional rates from a point within a state to a point of shipment within that state, the Railroad Commission of that state had in such a case where Congress had not acted, no more than in any other case, any authority which could constitutionally be given it to fix such a part of a through rate for a transit which was essentially interstate.

would not be altogether surprising in view of the strong dictum in the Minnesota Rate cases, if in some of the cases now pending in the Supreme Court it should be held that when a state commission directly interferes with the rate system established for the whole region, it may come in conflict with the federal jurisdiction as it stands to-day.

The enforcing of obligations by regulating commissions may also be attacked upon constitutional grounds when obedience to the order would result in what would virtually be confiscation. Ever since the leading case of *Smyth v. Ames*<sup>9</sup> it has been generally recognized that, when a rate is fixed so low as to prevent the carrier from getting a fair return upon the investment, such a rate operates in effect as a confiscation of the property invested in the business. To attempt to enforce such a rate would therefore be depriving the company of its property without due process of law. Such a rate is beyond the power of the State to put into effect, whether it is a specific rate fixed by the statute itself or a rate which a commission has sought to make under the power to fix rates confided to it.<sup>10</sup> This general limitation, and indeed all other constitutional restrictions upon governmental activity, rests necessarily upon any commission, limiting it in the exercise of its powers to fix rates, or to make any orders whatsoever. However sweeping the powers of the commission by the language of the act, the legislature could not authorize a subordinate body to fix rates in defiance of the rules of the Constitution any more than it could do so itself. Indeed, it would probably be said that the general power to fix rates, even stated in unqualified terms, should be interpreted in a reasonable sense as giving power only to fix such rates as the law of the land considers proper. As a matter of fact the statutes almost invariably use the qualifying phrase reasonable rates at least; and in some instances, however unwisely, the legislature lays down definite tests, such as fair returns upon property invested.

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<sup>9</sup> 169 U. S. 466, 18 Sup. Ct. 418 (1898).

<sup>10</sup> The confusing situation when a rate is established for the state as a whole specifically in a statute with the result that the legislation will be held void in its application as to railroads which cannot make a living under those rates, while remaining constitutional as to others, is not likely to arise when the fixing of the rates which the different railroads shall respectively charge is left to a commission. *St. Louis & St. Ry. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484 (1895).



One other constitutional limitation upon the regulating power should be noted. Regulation of this peculiar sort, going to the extent of compulsory service, should be confined to what may properly be considered public callings. Unless the business in question is one which is public in character it is not one which it would be due process of law to regulate to the extent of fixing its rates. And unless in the particular instance the business is being conducted upon a public basis, regulation to that extent of what is still a private affair would be equally improper. The business must be one in which the public has an interest, and at the same time one in which the proprietor has committed himself to serve the public. For the legislature, to make a general rule applicable to all concerns in certain businesses, or for a commission acting by its authority, to order that the public should be served by any particular company, unless both requisites are present, would seem to deprive the owners and proprietors of their liberty and property. At all events, we shall know more about all this when we get the decision in the *Pipe Line Cases*,<sup>11</sup> now before the Supreme Court. It is of course clear on the authorities that the operation of pipe lines such as are involved in that case is a business which is affected with a public interest. But when the proprietors have never taken anything but their own oil through these lines, or at all events never made any profession of taking oil for others, can they be said to have committed themselves to public service? A private carrier never engaged in transporting anything but his own property cannot be compelled to take goods of others, even if it is a great concern like a logging company with a railroad of its own. It is not obvious, unless weight is given to other facts in the record, how this pipe line case differs; but every case of this sort is to be decided upon its own merits.<sup>12</sup>

### III.

This distinction between the constitutional limitations upon all administrative powers and the statutory limitations upon the

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<sup>11</sup> 204 Fed. 798 (1913) in the court below.

<sup>12</sup> Where a railroad system engaged in interstate commerce controls through stock ownership a wharf company which has been chartered for the purpose of furnishing terminal facilities, the conduct of such a terminal being public in character is subject to the jurisdiction of the Interstate Commerce Commission. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279 (1911).

particular commission is often obscured, but must necessarily be made in analyzing authorities. It is really a different question which arises in these two cases, and it would not be proper to cite cases decided under one branch as precedents in the other. In the case of statutory limitations the law involved is largely that of the interpretation of statutes, while in the case of constitutional limitations the possibilities of delegation of power under our constitutions is the question. In dealing with the decisions of the Supreme Court of the United States on commission control of public utilities it is particularly necessary to insist upon the distinction, so often is it ignored with such danger of confusing the principles of law involved. Fortunately the cases with which the United States Supreme Court has had to deal relating to the general matter under discussion may be divided with unusual facility into these two classes. The cases which come to the Supreme Court wherever complaint is made of illegal action by state commissions arise under the Fourteenth Amendment, and are therefore devoted to the constitutional limitations upon commission action; for the proper interpretation of a state statute is not a federal question. On the other hand, the questions which come to the Supreme Court where the power of the Interstate Commerce Commission to act has been attacked have usually been questions involving the statutory limitations of the Interstate Commerce Act, although occasionally the constitutional limits upon congressional authorization have been brought in question. These obviously are different problems; and, as will appear later, what is not confiscation of the property of a company may be a course which by fair interpretation of statutory authority it would not be reasonable to require. Such a case is *Minneapolis & St. Louis Railway v. Minnesota*,<sup>13</sup> where it was held that a state might without violating the Fourteenth Amendment reduce rates on a particular commodity below what was profitable, so long as the rates as a whole still produced a return which was adequate.<sup>14</sup>

The Supreme Court of the United States has several times

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<sup>13</sup> 186 U. S. 257, 22 Sup. Ct. 901 (1902).

<sup>14</sup> See by way of contrast *Pennsylvania Railroad v. Philadelphia Co.*, 220 Pa. St. 100, 68 Atl. 576 (1908), holding that to reduce passenger fares so that there was no sufficient profit left in that branch of the business was going too far, although the freight earnings were so large that the business as a whole was amply profitable.



within the past few years enumerated the various classes of cases in which it has concluded that it is its duty to set aside the action of the Interstate Commerce Commission. In *Interstate Commerce Commission v. Illinois Central Railroad*<sup>15</sup> the following were set forth as the grounds for taking such action. "In determining whether an order of the Commission shall be suspended or set aside, the Supreme Court must consider (a) all relevant questions of constitutional power of right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) whether, even although the order be in form within the delegated power, nevertheless, it must be treated as not embraced therein, because its authority has been manifested in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power; but (d) the Supreme Court may not, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful order upon its conception as to whether the administrative power has been wisely exercised." It will be noted that by putting (a) and (b) first in order the court emphasizes the fundamental distinction; and it then not improperly adds such working rules as (c) and (d), which might upon analysis be resolved into the elementary principles.<sup>16</sup>

More elaborate is the listing of the instances in which the courts will feel called upon to set aside the orders of the Commission in the recent case of *Interstate Commerce Commission v. Union Pacific Railroad*.<sup>17</sup> "While there has been no attempt to make an exhaustive statement of the principles involved, in cases thus far decided it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon mistake of law. But questions of fact may be involved in the deter-

<sup>15</sup> 215 U. S. 452, 30 Sup. Ct. 155 (1910).

<sup>16</sup> Under the Act a suit in the court to enjoin an order of the commission fixing charges is not confined to an ascertainment of what was determined by the commission and to a consideration of the sufficiency of the facts as determined by it to sustain the order; but on the contrary the hearing may be *de novo*, and may include the taking and consideration of evidence other than that before the commission. *Missouri K. & T. Ry. Co. v. Interstate Commerce Commission*, 164 Fed. 645 (1908).

<sup>17</sup> 222 U. S. 541, 32 Sup. Ct. 108 (1912).

mination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority there involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."<sup>18</sup>

Recourse to the courts to settle these questions is itself governed by these principles. The vindication of the constitutional securities of those whose rights have been invaded cannot be withdrawn from the courts, nor can the power to say whether the coercion in question is without warrant of law. Even without a provision in the legislation for the determination by the judiciary of the question whether the authorities have exceeded their powers, the courts will give appropriate relief to a plaintiff whose rights are being invaded by public officers acting beyond their real authority. But whether there shall be anything in the nature of an appeal on the facts from the judgment of the commission, and the extent of that right, is altogether a question of what statutory provision has been made therefor. In the case of the Interstate Commerce Commission, Congress has left to the judgment of that body upon the facts before it about as much finality as is constitutionally possible, as was pointed out recently in *Atchison, Topeka & Santa Fe Railway v. United States*.<sup>19</sup> But examination of the facts which are material to the controversy is so indispensable in any justiciable question that the federal courts often seem to be reviewing the discretion of the Commission as to facts, when they are in reality only keeping it within the laws.<sup>20</sup>

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<sup>18</sup> Where the commission orders carriers to desist from according different rates to coal intended for the use of railroads than to commercial coal, and the facts, circumstances and conditions upon which it bases its orders are undisputed, and the question involved is the construction of the pertinent sections of the Act to determine whether the different charges constitute violations of those sections, the order is not merely administrative and is open to review by the courts. *Interstate Commerce Commission v. Baltimore & O. R. R. Co.*, 225 U. S. 326, 32 Sup. Ct. 742 (1912).

<sup>19</sup> 232 U. S. 199, 34 Sup. Ct. 291 (1914).

<sup>20</sup> It is competent for the legislature to provide that the burden of proof shall be



It should be noted in this connection that no case of invasion of rights secured by the Constitution arises when the Commission dismisses by an adverse decision a shipper who is complaining that rates charged him are more than he should be obliged to pay. As has just been seen, where a carrier is subjected to regulation to the extent of being obliged to serve at less than a fair return, it is being subjected to unconstitutional deprivations. But unlike the carrier who must serve all at the rate established by law, the shipper is not obliged to ship unless he wishes, and his property is not therefore taken from him by compulsory process in the view of the law. This doctrine that, whereas a carrier has constitutional rights to attack the decision of a commission, the shipper only has such statutory rights as may be provided, is shown in the recent case of *Hooker v. Knapp*.<sup>21</sup> That case held that, as the system of procedure provided by the Interstate Commerce Act contained no provision for appeal by a party whose complaint had been dismissed by the Interstate Commerce Commission, he had no right whatever, as he had no basis for recourse to the courts upon the ground that he could not earn a livelihood shipping at the rates upon the existing basis.<sup>22</sup> This decision is quite consistent with the theory of administration underlying our system at present. If the body duly charged with seeing that only such rates are charged as are reasonable decides that the interests of the public are protected, why should anybody have any standing to go to the courts about it any more than for any other difference of opinion as to matters of government?

When, therefore, the provisions which Congress has made show plainly enough that the jurisdiction of the Commission was designed to be exclusive, that will be the end of cognizance of such matters before any other tribunal, — otherwise than has just been described, by recourse to the proper court, to set the order of the Commission aside as in excess of jurisdiction. How far the

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upon those seeking to set aside the action of the commission as unreasonable; but to declare that the findings of the commission shall be taken as conclusive evidence of what is reasonable in the premises would be withdrawing ultimate rights from judicial inquiry, which cannot constitutionally be done. *Richmond & D. R. R. v. Tramwell*, 53 Fed. 196 (1892).

<sup>21</sup> 225 U. S. 302, 32 Sup. Ct. 769 (1912).

<sup>22</sup> In the opinion in *Proctor-Gamble & Co. v. United States*, 225 U. S. 282, 32 Sup. Ct. 761 (1912), the bases for this doctrine were first stated.

courts will go in working out such intent is seen in the leading case of *Texas & Pacific Railway v. Abilene Cotton Oil Company*,<sup>23</sup> where it was held that, as to wrongs done shippers for which redress was provided by the processes of the Commission, no suit could be brought elsewhere in any court. If a shipper is ready to prove that the rate charged him was outrageously high he can no longer, as formerly, litigate the matter in the courts, and show that the established rate is unreasonable. He must go to the Commission to get the scheduled rate set aside, and reparation awarded him for the extortion. Indeed, the theory is that the scheduled rate is the only legal rate until thus altered; and this has had the startling result of compelling shippers to pay the scheduled rate, even when a lower rate was quoted them.<sup>24</sup> Whatever is duly confided to the jurisdiction of a commission is thus automatically withdrawn from the cognizance of the courts as an original question.

#### IV.

The general scope of the jurisdiction of a commission is usually plain enough; it is the application of these principles to the facts which makes the difficulties. As to the matters placed within the jurisdiction of a commission to regulate, these may ordinarily be determined by an examination of the statute itself. Over what callings a commission has jurisdiction can usually be stated by simply reading the act. There was no basis upon which the Interstate Commerce Commission could have pretended to have power over telephones until its jurisdiction was extended to this

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<sup>23</sup> 204 U. S. 426, 27 Sup. Ct. 350 (1907).

In *Robinson v. Baltimore & O. Ry.*, 222 U. S. 506, 32 Sup. Ct. 113 (1912), it was held that no action based upon a complaint of discrimination resulting from the enforcement of schedules in effect could be brought in the courts, exclusive jurisdiction to reform such schedules as might be thought to be discriminatory having been given to the commission, together with the secondary relief of private reparation for damages caused by the past enforcement of such schedules.

<sup>24</sup> *Texas & P. Ry. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 242 (1906), is the case most often discussed in this connection.

Since the commission now has power to suspend the taking effect of rates filed with it, it would seem that the courts have no power to enjoin the filing of a schedule of rates under a bill brought prior to the date of filing of the tariffs, since the commission has exclusive jurisdiction of determining all questions of reasonableness with respect to rates. *Columbus Iron & Steel Co. v. Kanawha & M. Ry. Co.*, 171 Fed. 713 (1909).



service by the recent amendment. But there are always outstanding doubts as to what jurisdiction has been given to the Interstate Commerce Commission by the various clauses of the Act to Regulate Commerce with its successive amendments. It was not until the recent decision of the Supreme Court in *Omaha & Council Bluffs Street Railway v. Interstate Commerce Commission*,<sup>25</sup> that it was settled that Congress, by putting interstate transportation by railroad companies under the jurisdiction of the commission, had not intended to include a street railway running over an interstate bridge. To what extent the commission has power to go in regulating the businesses upon its list may also usually be discovered without difficulty by consulting the statute. Thus it would not occur to anyone that, as the Act to Regulate Commerce now stands, a railroad company would have to get permission from the Interstate Commerce Commission for the making of a bond issue.<sup>26</sup> Nevertheless there are many questions as to the conditions upon which the powers apparently granted to the commission may be exercised, as will be seen presently.

Sometimes it is easy to see the limitations which the statute imposes upon the action of the commission; at other times it is difficult. Where there are explicit clauses plainly stating the powers conferred, it would seem that there ought to be no hesitation in keeping the commission within the law. If the legislature has judged it wise to confine the activity of the commission within bounds which it has fixed, there is nothing for the courts to do except to insist that the commission takes no action beyond these limits. Whether the court thinks that the policy of the legislature in thus limiting the scope of the work of the commission is wise or not should make no difference. It is a question of holding the commission to the limitations set upon it for better or worse. On the other hand, if the legislature by true intendment has said that the jurisdiction of the commission shall go to certain lengths, it is not for the commission to cut down the scope of the act by im-

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<sup>25</sup> 230 U. S. 324, 33 Sup. Ct. 890 (1913).

<sup>26</sup> A case similar in character involving simply the interpretation of the scope of the phraseology of the Act is *Interstate Commerce Commission v. Humbolt S. S. Co.*, 224 U. S. 474, 32 Sup. Ct. 556 (1912), where the court ordered the commission to take cognizance of matters relating to carriage in Alaska, on the ground that the district was sufficiently described by the word territory.

posing limitations of its own upon the extent of the legislation. The commission as an administrative body is there to enforce the law; thus far it may go and no further. It is all a question of getting at the true intent of the legislative provisions by proper interpretation. Thus, in *Interstate Commerce Commission v. Delaware, Lackawanna & Western Railway*,<sup>27</sup> it was held, in view of certain canons of statutory interpretation peculiarly applicable to the case, that forwarders collecting goods of others were as much within the Act as other shippers, and could not be refused car-load rates enjoyed by others.<sup>28</sup>

Where the conditions are explicit there is no excuse for taking action without warrant of law. It is only where the phraseology is capable of various interpretations that the court has any scope for those canons which teach us to construe legislation of this sort as liberally as one may in order to effect the objects which the legislature seems to have had in mind. A good example of the enforcement of the statute as it stood is the case of *Interstate Commerce Commission v. Delaware, Lackawanna & Western Railway*,<sup>29</sup> where the power of the Interstate Commerce Commission under Section 1 of the Act to Regulate Commerce was brought to question. By the reading of that part of the section it appeared that shippers who were prejudiced by lack of shipping facilities could go to the Commission for an order for the establishment of a switch connection with the railroad system. The applicant in this particular case was not a shipper, but the owner of a branch line desirous of establishing business relations. The court spoke sharply on this point of confining the power of the Commission to the Act.<sup>30</sup> The statute provides the only remedy which Congress had in mind, it said. It stands as the law, and must be accepted as the

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<sup>27</sup> 220 U. S. 235, 31 Sup. Ct. 392 (1911).

<sup>28</sup> The right to reparation being secured to shippers for two years by the Act, the commission cannot qualify that right by barring a complainant for laches within that time, or by demanding that the proof shall be conclusive. *Thompson Lumber Co. v. Interstate Commerce Commission*, 193 Fed. 682 (1910).

<sup>29</sup> 216 U. S. 531, 30 Sup. Ct. 415 (1910).

<sup>30</sup> Not only may the commission not give relief to complainants who have no rights under the Act, but it cannot entertain complaints for wrongs not covered by the Act. See *Pittsburgh C. C. & St. L. Ry. v. Knox*, 177 Ind. 344, 98 N. E. 295 (1912), holding that the Commission has no jurisdiction under the Act over suits by shippers to recover damages caused by delays in transportation.



limit of the Commission's power. Congress was not giving any rights to other roads; nor was it subjecting one railroad system to demands of another.

A similar case — *Interstate Commerce Commission v. Northern Pacific Railway*<sup>31</sup> — decided the same term, gave the court more difficulty. Section 15 of the Act as it stood provided that the Commission might establish through routes and joint rates provided no reasonable or satisfactory through route existed. The Commission ordered a new through route between termini, where another through route had already been established. The Commission had decided upon grounds sufficient to itself that the existing route was not a reasonable or satisfactory one, and directed the establishment of another route, involving, a short hauling for the railroad which had formerly had the long haul. That railroad thereupon took the case to the courts, demanding that it should be determined by judicial inquiry whether the existing route was really reasonable or satisfactory. Unless this jurisdictional fact was established the railroad contended that the Commission, under the Act, had no authority to take any action whatsoever in relation to the establishment of joint rates. The Supreme Court held to the position taken in the previous case that the limitations in the Act must be respected. It was urged on behalf of the Commission that this condition was addressed only to the discretion of the Commission itself, and could not be examined by the courts independently as a fact. The court admitted that the difficulty of distinguishing between a rule of law for the guidance of a tribunal and a limit set to its power is sometimes considerable. But it said that the condition in the Act is not to be trifled away; and there seemed to be no reason for not taking the proviso of the Act in its natural sense. The Commission, therefore, was held to have no power to order a new route, since it appeared that the court below had properly found the existing route reasonable.<sup>32</sup>

That a commission cannot of its own motion impose conditions

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<sup>31</sup> 216 U. S. 538, 30 Sup. Ct. 155 (1910).

<sup>32</sup> In the case of *Southern Pacific Ry. v. Interstate Commerce Commission*, 200 U. S. 536, 26 Sup. Ct. 330 (1906), it had been held that in the absence of provisions in the Act giving the commission power, carriers could not be forbidden from following the practice of reserving in quoting a through rate the right to designate the connection which should be employed.

upon the exercise of its powers where no conditions exist would seem to be equally plain. If no limitations have been laid down for the action of the commission, it cannot add to these requirements others of its own, failing which it will refuse to go forward with its duty of carrying the law into effect. There have not been any cases especially significant where the Interstate Commerce Commission has mistaken its functions so far as to attempt to impose conditions upon the exercise of its powers where Congress has set none. In some of the states, however, the commissions in regard to certain powers, notably in the case of permitting the issuance of securities by the corporations subject to its jurisdiction, have boldly specified the conditions upon which obtaining favorable action would depend. As the Interstate Commerce Commission is likely very soon to get some measure of power over the issue of securities, it may be well to go out of the line of decisions which is being followed to call attention to those New York cases, such as *People ex rel. Binghampton Light, Heat and Power Company v. Stevens*,<sup>33</sup> where it was held that the commission had no power to permit an issue of securities upon condition that certain outstanding stock of the utility should be canceled, but could simply determine whether the proposed issue of stock was in accordance with the statute.<sup>34</sup>

For a commission to tamper with a statute either by extending its scope or by contracting its provisions would be legislation and not administration. Just as the commission has no excluding power by which it can make the statute less than it is, so it has no expanding power by which it can make the statute more extensive. A commission cannot make that lawful which the statute makes unlawful, nor make unlawful that which the law does not condemn. There is no dispensing power in our governmental system which can be confided to administrative bodies where rights of person or property are so involved as they are in the regulation of the conduct of those who devote their property to public service. Here again the Interstate Commerce Commission has never sought to so exalt its functions; but apparently this has happened once at least in the case of a state commission. At all events, there is

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<sup>33</sup> 203 N. Y. 22, 96 N. E. 114 (1910).

<sup>34</sup> See to the same effect *Fall River Gas Co. v. Board of Commissioners*, 214 Mass. 529, 102 N. E. 475 (1913).



the case of *Railway Commission v. Galveston Chamber of Commerce*,<sup>35</sup> holding that a state railroad commission cannot authorize railroads to disregard the provisions of the statute prohibiting unjust discrimination in charges for similar service.<sup>36</sup>

## V.

From the beginning of federal regulation of interstate carriers to the present time the sound theory upon which that supervision has proceeded has been that the primary right to conduct its business remains with the carrier, the commission having secondary power to take action when revision is called for. Under the original Interstate Commerce Act the power of the Commission to give relief from unreasonable charges was held by the Supreme Court in *Interstate Commerce Commission v. Texas Pacific Railway*<sup>37</sup> to go no further than to declare the existing rate unreasonable. But by the amendments of 1906 the Commission was given the further power, after finding the rate which was being charged unreasonable, to fix a reasonable rate for the future.<sup>38</sup> It should be noted that important as that amendment was it did not change the fundamentals of the situation. The carrier still retains the right to make its rates, the Commission having power only to set them aside under the conditions named in the Act. As to the constitutionality of the Act as amended, there would seem to be no doubt, as it has repeatedly held that such power — even in the more extreme form of establishing rates and making schedules — may be given over to a commission by the legislature. At all events the only question which has been seriously litigated under the Interstate Commerce Act is the extent to which limitations are imposed upon the Interstate Commerce Commission.

The process provided by the Act in accordance with the prin-

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<sup>35</sup> 51 Tex. Civ. App. 476, 115 S. W. 94 (1908).

<sup>36</sup> A commission can neither add to nor subtract from the legislation which it is administering. See *Mayo v. Western Union Telegraph Co.*, 112 N. C. 343, 16 S. E. 1006 (1893), holding that a commission cannot prescribe other rules than those in the Act.

<sup>37</sup> 167 U. S. 479, 17 Sup. Ct. 896 (1897).

<sup>38</sup> Likewise the commission has always had authority to order a railroad to so adjust its rates as to prevent discrimination against a shipper without prescribing the new rates to be applied, or specifying how the charges should be equalized. *New York Central & H. R. R. Co. v. Interstate Commerce Commission*, 168 Fed. 131 (1909).

ciples under discussion is the measure of the authority of the Commission. The Commission cannot take action affecting the charges of a carrier except upon the basis of a hearing and a finding upon the evidence that the rate being charged is unreasonable. Not until such a finding has been made has the Commission, as the Act reads, any jurisdiction to take any further action. The power of the Commission to alter rates depends altogether upon the fact of their unreasonableness, and in the absence of evidence to that effect the Commission has no authority. All this may not have been so plain in regard to this amendment at the outset as it has become subsequently in the light of the decisions interpreting it. But by the time that the case of *Interstate Commerce Commission v. Stickney*<sup>39</sup> was decided it had become clear enough that a carrier under Section 15 as amended was entitled to a finding by the Commission that the particular charge complained of was unreasonable before a change could be required.<sup>40</sup> Moreover, as that case held, a charge for a service which did not give the carrier more than a fair profit for performing it, was not unreasonable. For the Commission to attempt to fix a new rate at the out of pocket cost in place of the existing rate which included a profit upon the service performed, was therefore altogether beyond the statutory limitations upon the power of the Commission. Probably, however, this would not be an invasion of constitutional rights, since the profits of the company taken as a whole apparently remained sufficient.

The duty of the Commission is not that of a lawmaker laying down such rules of public policy as it may think will promote the common weal. Its function is to see whether the rates which the carrier is charging are in accordance with the requirements of law laid down in the Act and, if they are not, to make them so. As was insisted in *Interstate Commerce Commission v. Chicago, Rock Island and Pacific Railway*,<sup>41</sup> this determination is for the Commission in first instance, the power of the courts being confined to discovering whether the action of the Commission is within the scope of the delegated authority under which it purports to have

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<sup>39</sup> 215 U. S. 98, 30 Sup. Ct. 66 (1910).

<sup>40</sup> It should be noted that the commission has no power under the Act to fix minimum rates for the protection of a competitor; its jurisdiction is confined to fixing maximum rates for the carriers involved in the proceedings before it. See *Norfolk & W. R. R.*, 195 Fed. 953 (1910).

<sup>41</sup> 218 U. S. 88, 30 Sup. Ct. 651 (1910).



been made. The question in that particular case was a close one, as the Commission had obviously certain policies of rate-making in mind in dealing with basing points which inevitably involve the respective position of trade centers. The carriers complained to the courts that, by the artificial apportionments made, the Commission was laying an arbitrary hand upon the traffic of the country. But the Supreme Court decided that there was enough in the record to satisfy it that the rates set aside were unreasonable, and that the rates put in their place were proper. The Court was divided however; and it was obvious that further discussion of the whole matter would soon be required. It is all very well to say, as the majority did, that commissions must have a broad outlook;<sup>42</sup> but the question is by what rules are they to act if we are to have a government of laws, not of men.

The significance of the limitations in the Act as amended was probably not brought to the attention of the country until the case of the *Southern Pacific v. Interstate Commerce Commission*.<sup>43</sup> The Commission, as it appeared in that case, had come to the rescue of the lumber industry of the Willamette valley, which was threatened by advances in rates which had been put into effect shortly before. At all events, it had after due proceedings fixed lower rates for the future in place of the old rates, apparently upon the ground that it would be a wise policy to keep open the markets which had thus been closed. The earlier rates undoubtedly had thus created markets upon which the shippers had come to rely; but, as the Supreme Court pointed out, all these arguments ignored the provisions of the Act. In the absence of a finding that the advanced rates which carriers had put in effect were unreasonable, the Commission had no jurisdiction to go further; and this was not

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<sup>42</sup> In a few states the courts have apparently adopted the theory of the economists, that a railroad should so fix its rates as to equalize the advantages of its patrons in so far as this will be for the good of the country. In *State v. Minneapolis & St. L. Ry.*, 80 Minn. 191, 83 N. W. 60 (1900), it was held that a commission in fixing rates might act upon the business policies which the railroads themselves have been accustomed to pursue in making rates. And in *Southern Ry. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429 (1907), it was held that a commission is not precluded from the consideration of economic conditions potentially influencing freight charges. This is little different from the rule of charging what the traffic will bear, which means fixing rates without any basis in law.

<sup>43</sup> 219 U. S. 433, 31 Sup. Ct. 288 (1911).

made out by showing that public interests would be promoted by lower rates.<sup>44</sup> Such arguments might sometimes avail carriers in explaining differentials; but they could not justify commissions in ordering changes.

What is a reasonable rate is a matter as to which our modern law has some ideas, although they are by no means as clear as they soon will be with the development now going on so rapidly in this branch of the law. We are at a point where progress can at least be made in this matter, with the famous case of *Interstate Commerce Commission v. Atchison, Topeka, Santa Fé Railway* at last brought to a termination by the late affirmation of the Supreme Court.<sup>45</sup> This matter of the Lemon rates from the Pacific coast has been going back and forth between the Commission and the courts for some time. First, the Commission reduced the rates for reasons in last analysis more economic than legal; and this order the Commerce Court set aside, as the existing rate had not been sufficiently shown to be unreasonable in the sense of the law. Then the Commission took further testimony, making at least a showing sufficient to justify it in declaring the existing rates unreasonable, and substituted new rates; and the federal court then held in effect that whatever motive might be behind this action there was reason enough apparent in the record for the course it had pursued.<sup>46</sup> And indeed this final action is good administration, quite in accordance with the distinction between the motives for taking action at a particular time and the basis upon which that action is

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<sup>44</sup> The general principle which the majority of courts are now laying down as the guide for all concerned seems to be that what is a reasonable rate depends upon the significance of that phrase at common law. *Southern Indiana R. R. v. Railroad Commission*, 172 Ind. 113 (1910). The question then is what, in view of all the facts affecting the movement of a commodity, is the amount which a carrier should obtain to recoup itself fully for the service it is rendering, having in mind the property it is employing in performing the transportation. *Morgans L. & T. R. R. & S. S. Co. v. Railroad Commission*, 127 La. 635 (1911).

<sup>45</sup> 231 U. S. 736, 34 Sup. Ct. 316 (1913).

<sup>46</sup> It should be said that the basing of rates upon what is economically desirable has never been the test of the federal courts in reviewing the orders of the Interstate Commerce Commission in relation to rates. *Philadelphia & R. Ry. v. Interstate Commerce Commission*, 174 Fed. 687 (1909). On the contrary, the courts have always insisted that the commission shall keep itself to the basis of the conditions affecting the movement of traffic as the standard established by the laws for the reasonableness of rates. *Interstate Commerce Commission v. Delaware L. & W. Ry.*, 64 Fed. 723 (1896).



founded. To what it will devote its efforts at any given time is a matter of administrative discretion; but what it may then do is a matter of jurisdictional limitation.

Nothing is more difficult to bring within these requirements than the issues raised in the Intermountain Case which has recently been argued before the Supreme Court.<sup>47</sup> There is a long history back of the case which it is difficult to summarize in brief compass. Under Section 4 as it originally stood, the United States Supreme Court held in *East Tennessee, Virginia & Georgia Railway v. Interstate Commerce Commission*<sup>48</sup> that competition existing at the distant point while there was no competition at the intermediate point constituted a circumstance so dissimilar as to justify charging more for the short haul than for the long without getting permission from the Commission. As amended in 1910, jurisdiction to pass upon those cases where the carrier was charging more for the short haul than for the longer distance was unequivocally conferred upon the Commission. The Commission thereupon made some general orders as to the relation to be observed between the Intermountain rates and those to the Pacific coast. The railroads are contending that this is going beyond limits of the administrative function into the realm of arbitrary power. Whether this is so or not depends upon whether the Commission may be said to be basing its action upon principles of law applicable to the case. We cannot leave to a commission, any more than to the railroad itself, the power to build up communities or destroy them at its own whim or caprice. We must have here as elsewhere principles of law as to what things in the movement of traffic are of such weight as to determine the reasonableness of the rate charged. However, as to this particular

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<sup>47</sup> 191 Fed. 856 (1913), in the courts below.

<sup>48</sup> 181 U. S. 1, 21 Sup. Ct. 516 (1901). Ever since this decision of the Supreme Court to the effect that competition created such a dissimilarity of circumstance as to justify a disproportion in rates, there has been a constant tendency to narrow the scope of that holding. At the present moment the law on this point seems to be in the unsatisfactory state that although a carrier may still justify itself in making its rates on this basis, the commission should not assume the power to compel the making of such differentials. Even so the law is becoming insistent that the decision shall not be interpreted as giving the carrier arbitrary power to divert traffic by special rates even when it is for its business advantage to keep business to its own lines by so doing. *Interstate Commerce Commission v. Louisville & N. Ry.*, 118 Fed. 613 (1902).

matter it may be that the principle that, when competition is found in cases like these, the rate may be reduced sufficiently to meet it, has been so incorporated into the law governing this situation that all that is left to the Commission to do is to permit such reductions wherever it finds competition.

## VI.

Thus stands at present the jurisdiction of the Interstate Commerce Commission over rates. Under the Act the carrier retains the primary right to make rates; but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and fix for the future that rate which it regards as reasonable. Therefore, unless there is evidence before the Commission to show that the rates attacked were unreasonable, there is no jurisdiction to proceed further. To be sure, the courts will not review conclusions of fact by passing upon conflicting testimony. But the legal effect of evidence is a question of law; and a finding without evidence is beyond the power of any commission. The value of evidence varies, and the weight to be given to it is peculiarly for the commission. Notwithstanding this, a finding without evidence of any sufficient character is a nullity, as is said in *Atlantic Coast Line v. Interstate Commerce Commission*.<sup>49</sup> Such authority cannot be granted to any body, even if Congress could be conceived of as so designing. To confide such power to a commission would be inconsistent with the fundamental principles of justice and an exercise of arbitrary power condemned by the Constitution.<sup>50</sup>

Whether the circumstances of the exercise of the power to give orders are such as conduce to justice may therefore be the subject of inquiry by the courts. In the late case of *Interstate Commerce Commission v. Louisville & Nashville Railroad*,<sup>51</sup> the Supreme

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<sup>49</sup> 194 Fed. 449 (1912).

<sup>50</sup> In a petition to the Circuit Court to enforce an order of the commission before the judge sitting without a jury, the full report of the commission, containing a commingled statement of opinion drawn from the facts and of conclusions of law, as well as of the facts themselves, was admitted in evidence, complainant stating to the court the nature of said report and offering it in evidence in so far as the facts therein contained were material or competent. The court held the admission of said report was not prejudicial on the ground that it included the extraneous opinions and conclusions of the commission. *Chicago, B. & Q. R. R. Co. v. Feintuch*, 191 Fed. 482.

<sup>51</sup> 227 U. S. 88, 33 Sup. Ct. 185 (1913).



Court pointed out that this could always be done, as the questions raised were in a true sense justiciable. Whether the order deprives the carrier of a constitutional or statutory right, said the Court, and whether the hearing was adequate and fair, are all matters within the scope of the judicial power. In the comparatively few cases in which such questions have arisen the Court pointed out<sup>52</sup> that it has invariably been recognized that administrative orders quasi-judicial in character are void — (1) if a hearing was denied; (2) if although granted it was inadequate or manifestly unfair; (3) if the finding was contrary to the indisputable character of the evidence; (4) or if the facts found do not as a matter of law support the order made. This is one of the most important of the recent cases upon this subject in the Supreme Court, and it will well repay careful reading.

This means that in order to have what may pass as due process of law there cannot be substantial disregard of our ancient traditions. The commission is an administrative body essentially, not bound necessarily to the technique of judicial tribunals. As was held in *Interstate Commerce Commission v. Baird*<sup>53</sup> it is not limited to the strict rules as to the admissibility of evidence which prevail in suits between private parties. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve those essentials of action in accordance with evidence adduced by which rights have immemorably been asserted or defended. The Commission is not justified in condemning rates and making revisions upon mere impressions and comparisons, but may act only upon facts and conditions duly established. In this light the right to a hearing which the Act provides must be fully protected.<sup>54</sup> Manifestly there is no hearing in any true sense

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<sup>52</sup> Citing along with various cases discussed in this article. *Atlantic C. L. Ry. v. North Carolina Corp. Comm.*, 206 U. S. 1, 27 Sup. Ct. 585 (1907); and *Wisconsin M. & P. R. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115 (1900).

<sup>53</sup> 194 U. S. 25, 24 Sup. Ct. 563 (1912).

<sup>54</sup> The primary purpose of the Interstate Commerce Act is to regulate interstate business of carriers, and the secondary purpose, that for which the commission was established, to enforce the regulations enacted by it, and the power to require testimony is limited, as is usual in English-speaking countries, to investigations concerning a specific breach of the existing law; this power is not extended to mere investigations by provisions in any of the amendatory acts in regard to annual reports of interstate carriers, or of the commission, or for the purpose of recommending legislation. *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 Sup. Ct. 115 (1908).

unless the party knows what evidence is offered or considered, and is given opportunity to explain and refute it. This is not merely a matter of proper construction of the Act, it is a right which comes from the Constitution itself.

This argument was brought out fully in the Supreme Court recently where the contention was made that the findings and orders of the commission under Section 15 might be originally supported and subsequently defended by information which the commission had gathered under Section 12 for general purposes. But the Supreme Court would have none of this where the rights of parties were involved. When the point was raised apparently for the first time in *United States v. Baltimore & Ohio Southwestern Railroad*,<sup>55</sup> there was no question about the attitude of the Supreme Court. The Supreme Court is now plainly insistent that all parties before the Commission in any proceedings directed against them must be fully apprised of the evidence submitted or to be considered and must be given opportunity to cross-examine witnesses and to inspect documents and to offer evidence in explanation and rebuttal. In no other way consistently with what we consider the course of the administration of justice can a party maintain its rights or make out its defense. Moreover, as the Supreme Court has keenly appreciated, in no other way can the courts inquire as to the existence of evidence upon which the finding might be based; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient, information to support the finding.<sup>56</sup>

These are substantial rights that are thus jealously protected. It does not mean here or elsewhere that an administrative body is held to the rigorous limitations of a judicial tribunal. The case of *Cincinnati, Hamilton & Dayton Railroad v. Interstate Commerce Commission*<sup>57</sup> is still good law, although by its doctrine the com-

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<sup>55</sup> 226 U. S. 14, 33 Sup. Ct. 5 (1912).

<sup>56</sup> It should be noted however that within the range of its discretion in determining the reasonableness of rates it is entitled to select the testimony which it will rely upon according as it addresses itself to the discriminating judgment of the commission. *Louisville & N. R. R. v. Interstate Commerce Commission*, 195 Fed. 541 (1912).

<sup>57</sup> 206 U. S. 142, 27 Sup. Ct. 648 (1907).



mission is not confined to taking action responsive to the pleadings with which the proceedings were originally begun. It was held in that case that the Interstate Commerce Commission, in making an investigation on complaint of a shipper, has in the public interest the power, disembarrassed by any supposed admissions contained in the statement of the complaint, to consider the whole subject and the operation of the new classification complained of in the entire territory. If the Commission finds a new classification of rates engenders discrimination it has power on its own motion to prohibit the further enforcement of the same. A commission, in other words, has combined in its constitution two functions; as administrative body it may institute proceedings, but it passes upon the matters thus brought before it quasi-judicially.<sup>58</sup>

Some object to the loss of efficiency in administration by not having the knowledge which the Commission has accumulated in other proceedings available in all. Of what use, it is said, will be the having of an expert body intrusted with this work unless we can use at all times their special knowledge. But as a practical matter the difficulties of conforming to these requirements are not great. If the Commission takes care as it now does to have read into the record the documents it wishes, if it puts forward for examination the investigators it has used, the requirements are observed. Nobody objects to any commission using its expertness in dealing with the facts in the record; the objection would be to the commission giving judgment on evidence locked within themselves. All this is inconsistent with our notions of justice; by discretion we mean a judgment controlled by principles of law, as was said in *Nashville Grain Exchange v. United States*.<sup>59</sup> We are not content in modern times with the sort of equity which the Chancellor originally evolved from his inner consciousness to deal with each case as it came before him. Still less will any people with the traditions of

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<sup>58</sup> It should be added that it is provided in some of the commission acts of late that only the evidence which is in the record before the commission can be produced in proceedings in the courts to set aside the action of the commission, and that newly discovered matter must be brought before the commission by reopening the case; and it has been held that this exclusion of further evidence on these conditions is not depriving the parties of their right to get in all their evidence, and is therefore due process of law. *Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535 (1912).

<sup>59</sup> 191 Fed. 37 (1912).

our race rest under proceedings of the order of the Star Chamber without being confronted with testimony against them.<sup>60</sup>

## VII.

These decisions mean that as a people we will not be content to have our rights determined by administrative fiat; we demand reasoned judgment based upon ascertained principles generally understood. If the Commission is to be held to its function of administering the law, we must have some basis for determining the meaning of the word reasonable used in the Act. The Commission, as it has been seen, can only set aside a rate if it is unreasonable; in its place it can only fix a rate which is reasonable. But how is it to be determined what rates are unreasonable and what change would make them reasonable, unless we have definite principles universally recognized? The Interstate Commerce Commission itself has made noteworthy progress in the past few years in establishing by its decisions the bases upon which the reasonableness of rates depend as a matter of law. The Supreme Court has also of late years been giving the stamp of its approval to rules for the determination of the reasonableness of rates which seem at last to be practicable. Vague though a phrase in a statute may apparently be, yet it may well have a definite meaning in the law; and by the prevailing rule, when a given phrase has an accepted significance at common law, it should be taken in that sense. We must have some objective standard to go upon, or we have no security from subjective differences. What is reasonable according to principles of law governing the matter is what we must insist upon in order to confine our commissions to administration. If we have nothing to rely upon except what seems upon the whole to the body in power desirable or impolitic, we can hope for nothing better than benevolent despotism subject to all the corresponding risks of arbitrary power.

*Bruce Wyman.*

CAMBRIDGE, MASS.

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<sup>60</sup> As a final illustration of the extensive operation of the fundamental principles under discussion, the case of *State v. Great Northern Ry.*, 100 Minn. 445, 111 N. W. 289 (1907), may be taken. It was held in that case that for the legislature to leave to a commission the power to pass upon the issuance of securities without giving it any rules to guide it in its action was an unconstitutional delegation of power.



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DEAN AMES. — Friends of the late Dean Ames will be interested in reading the following extract from a recent judgment<sup>1</sup> of Lord Hal-dane, the present Lord High Chancellor of England:

"The history of the Action of Assumpsit has been described by a Writer to whom Lawyers and Historians alike owe much, the late Professor Ames of Harvard University, in language which shows how easily the fiction of a promise grew into part of the law."

The Lord Chancellor then quotes at length from Dean Ames' article, "The History of Assumpsit," which first appeared in the HARVARD LAW REVIEW for April, 1888 (2 HARV. L. REV. 1). In view of the great debt which the HARVARD LAW REVIEW owes to Dean Ames, it is a pleasure to call attention to this international recognition.

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COLLECTION OF BRIEFS IN THE LAW LIBRARY. — The board of student advisers has collected in a bound volume, now in the law-school library, all the briefs drawn up in the law clubs last year. A list of those submitted in the Ames Competition is to be found on page 603 of this Review. They were carefully prepared by second-year men at considerable length and are at the service of anyone who may be working on points of law similar to those involved. An index of the subjects of the Ames Competition for the year 1912-1913 may be found in 26 HARV. L. REV. 466.

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<sup>1</sup> Sinclair v. Brougham and another, (1914 Feb. 12) 30 T. L. R. 315.

PUBLIC ESTHETICS AS A BASIS FOR LEGISLATION. — An inherent function of sovereignty, as *parens patriæ*, is to protect social interests. The police power to regulate the exercise of individual property rights, or, if necessary, to destroy the property itself, springs from the necessity of this function.<sup>1</sup> But to be entitled to such legislative protection the interest must be one that is actually recognized and one the promotion of which will benefit, at least indirectly, the public as a whole. Although these interests were originally thought of as confined to health, safety and morals, the courts are unquestionably tending toward a broader test.<sup>2</sup> A recent case, on the other hand, holds that public esthetics is not such an interest, and that a statute is unconstitutional which prohibits the building of retail stores in residential sections without the consent of a majority of the abutters.<sup>3</sup> *People v. Chicago*, 103 N. E. 609 (Ill.). This view is consistent with the authorities.<sup>4</sup>

It has been urged that unsightliness may be legislated against as much as smoke or noise.<sup>5</sup> But the two groups are distinct. The comfort, or even health, of substantially everyone in the neighborhood is disturbed by smoke and noise,<sup>6</sup> and so its prevention is of direct public benefit. Probably the display of revolting diseases in patent-medicine advertisements could be prohibited on this ground.<sup>7</sup> But only a limited group of esthetes can be thought of as suffering serious discomfort or inconvenience from the spectacle of unsightly buildings.<sup>8</sup> True, the public may be uplifted by the presence of architectural beauties, but it is not offended by their absence. There is, therefore, no direct harm to the public as a whole.<sup>9</sup> Nor is the social interest in the protection of the

<sup>1</sup> A recent text-writer explains the police power as the law of overruling necessity. PRENTICE, POLICE POWER, ch. 1. It has also been suggested that the police power rests on the sovereign's responsibility to the public welfare to enforce the maxim, *sic utere tuo ut alienum non lædas*. See FREUND, POLICE POWER, § 8; TIEDEMAN, LIMITATIONS OF POLICE POWER, § 1.

<sup>2</sup> Police power has been declared to include legislation deemed by "strong and preponderant opinion to be greatly and immediately necessary for the public welfare." See Noble State Bank v. Haskell, 219 U. S. 104, 111; 26 HARV. L. REV. 631, 632 and footnotes; 17 HARV. L. REV. 275. "It will reveal the police power not as a fixed quantity, but as the expression of social, economic, and political conditions. As long as these conditions vary, the police power must continue to be elastic." FREUND, POLICE POWER, § 3.

<sup>3</sup> The further interests of comfort of the residents and of safety of the children would have been promoted by preventing the traffic incident to the establishment of retail stores in the section. But the benefit would seem too slight for such considerations to carry weight.

<sup>4</sup> Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N. E. 980; Passaic v. Paterson Bill etc. Co., 72 N. J. L. 285, 62 Atl. 267.

<sup>5</sup> FREUND, POLICE POWER, §§ 180 ff.; LARREMORE, PUBLIC ESTHETICS, 20 HARV. L. REV. 35.

<sup>6</sup> State v. White, 64 N. H. 48.

<sup>7</sup> See 17 HARV. L. REV. 275.

<sup>8</sup> See Curran Bill Posting and Distributing Co. v. Denver, 47 Colo. 221, 227, 107, Pac. 261, 264. "The cut of the dress, the color of the garment worn, the style of the hat, the architecture of the building or its color, may be distasteful to the refined senses of some, yet government can neither control nor regulate in such affairs."

<sup>9</sup> In this group of cases the legislature is substantially enlarging the category of public nuisances by declaring something to be a nuisance of which the harmful effect was insufficient to make it such at common law. See Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878; Denver v. Mullen, 7 Colo. 345, 353, 3 Pac. 693, 697. For collection of cases see 36 L. R. A. 593 note. The basis is damage to the public as a whole. See Quintini v. Bay St. Louis, 64 Miss. 483, 490, 1 So. 625, 628.



individual or the fastidious few from esthetic discomfort, strong enough to justify the restriction of personal liberty. Legislation to protect the weak, poor and unfortunate from economic duress presents extreme examples of the justifiable use of the police power in favor of a particular class.<sup>10</sup> On the score of the social interest involved, there is a clear distinction between such legislation and a statute shielding the esthetic members of the community from sense discomfort. The police power, it may be said, exists to protect, not to uplift.<sup>11</sup> Thus, esthetic considerations, it would seem, fall outside the scope of the police power until the sensibilities of the community as a whole become so highly developed that the public is shocked and disturbed by what is ugly.<sup>12</sup>

In the exercise of the right of eminent domain the sovereign is thought of, not as a protector, but as a purchaser of private property for public use.<sup>13</sup> Esthetic considerations are therefore more pertinent. As to the meaning of public use, the authorities are in great confusion.<sup>14</sup> But whatever distinctions may be taken as to the degree of utility necessary, it would seem that the benefit must accrue to the community as a whole, not merely to a particular class.<sup>15</sup> The foregoing discussion of the police power presupposed a state of society where the average individual would not be seriously shocked by the sight of an ugly building. Conversely, it may be assumed, to the average pedestrian the spectacle of symmetrical architecture will pass unnoticed. To exercise the right of eminent domain by imposing such building restrictions is comparable to appropriating an easement of light where a majority of the community is blind.<sup>16</sup> Under the test requiring actual use by the public, only a

<sup>10</sup> See 27 HARV. L. REV. 372; SWAYZE, JUDICIAL CONSTRUCTION OF THE FOURTEENTH AMENDMENT, 26 HARV. L. REV. 1. *Holden v. Hardy*, 169 U. S. 366 (eight-hour law for miners and smelters); *Petit v. Minnesota*, 177 U. S. 164 (Sunday law referring especially to barbers).

<sup>11</sup> This statement should be qualified to the extent that protection may demand an exercise of the police power along educational lines, such as compulsory education of children. But the theory of these cases is that the parent has no right to leave the child uneducated. See FREUND, POLICE POWER, §§ 264 ff.

<sup>12</sup> In *Cochran v. Preston*, 108 Md. 220, 229, 70 Atl. 113, 114, it was said of the police power, "it may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the Fine Arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power even for such purposes."

<sup>13</sup> See 1 LEWIS, EMINENT DOMAIN, 3 ed., §§ 1, 3. For an interesting argument that there is no distinction between taking property and regulating its use, see ABBOTT, POLICE POWER AND THE RIGHT TO COMPENSATION, 3 HARV. L. REV. 189. The fundamental distinction between the police power and the right of eminent domain would seem to lie in the end at which the legislation aims.

<sup>14</sup> See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 252. See also collection of cases in 22 L. R. A. (n. s.) 35 note.

<sup>15</sup> Thus the attempted acquisition of fishing rights for the public was held unconstitutional. *Albright v. Sussex Co. Lake & Park Commission*, 71 N. J. L. 303, 57 Atl. 398. The court said, "The main object of the present statute is to furnish a means of amusement or sport to the few persons who have the inclination and leisure for such pastime. . . . We have found no instance of the exercise of the power in order to afford a means of pastime capable of being enjoyed by only a few persons."

<sup>16</sup> See *Farist Steel Co. v. Bridgeport*, 60 Conn. 278, 28 Atl. 561; *Albright v. Sussex Co. Lake & Park Commission*, *supra*.

limited class would use the view; under that of public benefit, the advantage would be negligible.

Esthetic considerations, on the other hand, may be incidental to some other public user. A Massachusetts statute, limiting the height of buildings around a public park, was passed to secure beauty as well as an easement of light and air.<sup>17</sup> Land has been condemned for roads leading nowhere but to beautiful views.<sup>18</sup> But the public as a whole actually used the easement of light and air or the public drive, whether they were conscious of the esthetic advantages or not.<sup>19</sup>

A further distinction should be noticed as to motive. Gettysburg Park was built for the avowed purpose of fostering a spirit of national patriotism.<sup>20</sup> But here again an actual public user of the land taken was assured. The education of the public esthetic sensibilities, however desirable, is no justification until the further element of public user is present.

CONSTITUTIONALITY OF EUGENIC MARRIAGE LAWS.—The increasing interest in eugenics justifies a prediction that within a few years several states, following Wisconsin, will prohibit the issuing of a marriage license to any male applicant who does not produce a physician's certificate stating that he is free from venereal diseases.<sup>1</sup> Will such statutes be a violation of the Fourteenth Amendment?<sup>2</sup>

To be justified as an exercise of the police power, legislation which restrains liberty or deprives of property must secure a recognized social interest. Further, the means employed must be such as will reasonably bring about the desired result. Finally, the resulting disadvantages must not, either because the means employed are unreasonable and burdensome, or for any other reason, overbalance the social benefit gained. Clearly a eugenic marriage law subserves a vital social interest by protecting the health of the wife and of future generations.<sup>3</sup> It has been demonstrated that proper medical tests will determine with considerable certainty the existence of sexual diseases in those examined. Adequate medical supervision, coupled with denial of marriage to the sexually unfit, will therefore effectively protect the woman who marries in the state and the children of that marriage. It may be argued

<sup>17</sup> *Att'y-Gen. v. Williams*, 174 Mass. 476, 55 N. E. 77.

<sup>18</sup> *Higginson v. Nahant*, 11 Allen (Mass.) 530; petition of Mt. Washington Road Co., 35 N. H. 134.

<sup>19</sup> A more difficult case would arise where the sole object was to beautify the view from a public park. Since the public use the park for health and recreation, perhaps the fact that, consciously or unconsciously, they would derive a greater benefit from its use where the outlook was fine might distinguish the case from one where the restrictions are imposed upon any other part of the city. See *dictum* in *Att'y-Gen. v. Williams*, *supra*; *Parker v. Commonwealth*, 178 Mass. 199, 55 N. E. 634.

<sup>20</sup> *United States v. Gettysburg Electric Ry. Co.*, 160 U. S. 668.

<sup>1</sup> See a sign of the times in the message of the Governor of Indiana to the legislature in 1905, quoted in 10 J. COMP. LEG. 120, 121. Parliament will doubtless be much more conservative than will many American state legislatures. Cf. remarks of Lord Roseberry, in 1908, quoted in the same article.

<sup>2</sup> Or similar provisions in state constitutions.

<sup>3</sup> See FREUND, POLICE POWER, § 124; TIEDEMAN, POLICE POWER, § 149.



that this benefit will be offset by an increase in intercourse between couples who would otherwise marry, resulting in diseased unmarried women and diseased bastards; and that the law prefers diseased legitimate to diseased illegitimate children, and diseased wives to diseased mistresses. This consideration may well give pause to legislators. But that the restriction will afford protection to women contemplating marriage, and will effect a great reduction in the number of diseased children born into the world, is assuredly a reasonable view. It is therefore submitted that, if the state provides for adequate medical examination at its own expense, eugenic marriage laws, though they do restrain liberty, will be as unimpeachable as are statutes forbidding infant, miscegenetic, and consanguineous marriages, and those of epileptics and defectives.<sup>4</sup> Without exception, these statutes have been upheld when attacked as unreasonable exercises of the police power.<sup>5</sup>

The question remains whether, if the state does not bear the cost of the examination, the means employed will be unreasonable and oppressive, or so burdensome that they outweigh the benefit to society. The cost of a laboratory test, the only effective means of discovering the presence of sexual diseases, is rather large. Such an expenditure will admittedly be a hardship on the average young man desiring to marry. But the expenditure will be more than a mere hardship; it will necessarily be a hindrance to marriage, even among the healthy, which is obviously a detriment to society. Whether it outweighs the social benefit gained is a close question. Another important consideration is that requiring the applicant to pay for the examination makes a certain discrimination among the competent. Rich men may marry; poor men, in some cases, cannot. Statutes causing a similar discrimination, by requiring men desiring to engage in certain businesses to pay for an examination into their qualifications, have been upheld.<sup>6</sup> Here, however, the deprivation is only of one field of labor among many; while to deprive a healthy man of the right to marry merely because he is poorer than his fellows is to deprive him wholly of the legal means of exercising an all-important function of mankind. It must be admitted, therefore, that the combination of these considerations makes doubtful the validity of a eugenic marriage law which does not provide for examinations at the state's expense.

The Wisconsin law<sup>7</sup> calls for a laboratory examination, and provides that the physician's examination fee shall not exceed three dollars. Since, as the court found, the test cannot be made for that sum, the statute seems invalid on the ground that the means provided will not effect the desired result; since the requirement of the laboratory test and the prohibition as to the physician's fees are inconsistent, to enforce the statute would render marriage impossible. The decision of the circuit court of Milwaukee County, holding the law unconstitutional,

<sup>4</sup> All states have statutes prohibiting one or more of these classes of marriage. For typical examples, see ILLINOIS STATS. ANN., 1913, §§ 7345-7; BURNS ANN. STATS. (Ind.), 1908, §§ 8357, 8360, 8365; MICHIGAN STATS. ANN., 2 ed., 1913, §§ 11423, 11425, 11426, 11428.

<sup>5</sup> Gould v. Gould, 78 Conn. 242, 61 Atl. 604; Lonas v. State, 3 Heisk. (Tenn.) 287.

<sup>6</sup> State v. Forcier, 65 N. H. 42; State v. Heinemann, 80 Wis. 253, 49 N. W. 818.

<sup>7</sup> WISCONSIN SESSION LAWS, 1913, pp. 1060-1062.

therefore seems correct. *Peterson v. Widule* (Dist. Ct. of Milwaukee County, Wis.). Not officially reported.<sup>8</sup>

It would seem that those state legislatures which are desirous of obtaining the social benefits offered by such laws would do well, in framing them, to insure their constitutionality by providing that the cost of the examinations be borne by the state.

WHAT LAW GOVERNS LIABILITY OF SHAREHOLDERS FOR CORPORATE DEBTS. — On exactly what basis the individual liability of shareholders to corporation creditors should be placed is not clear. It is true the liability seems consensual, for a shareholder taking stock assents to be bound by the terms of the corporation charter and the law of the creating state. But there can be no strict contract, for the shareholder's obligation runs to no specified promisee.<sup>1</sup> Moreover, by a transfer of his shares, the stockholder can effect a complete novation, freeing himself from all liability, and yet this substitution requires no consent from creditor, state, or other shareholders. Hence some courts deny that the obligation is a contractual one, and declare it merely a statutory liability incidental to the ownership of shares.<sup>2</sup> Likewise it has been suggested that, though contractual, this liability is in the nature of a covenant running with the land and binds each successive shareholder.<sup>3</sup> Whether or not the real nature of the relationship can be logically explained on the authorities, it is generally treated as a contract between shareholder and creditor, subject to automatic novation, governed in terms by the corporation charter and the law of the creating state<sup>4</sup> and enforceable

<sup>8</sup> A copy of the decision was furnished to the Review. The proceeding was a petition to compel the county clerk to issue a license to the petitioner even though he had no physician's certificate. It is understood that an appeal from the decision will be heard at an early date by the state supreme court.

The court held the law unconstitutional as violating the sections of the Wisconsin Constitution recognizing the inherent right of all to life and liberty, and forbidding control of or interference with rights of conscience. Art. I, secs. 1 and 18. The latter ground seems clearly unsound. People who conscientiously believe that the state has no concern with marriage are nevertheless amenable to the state marriage law. *State v. Walker*, 36 Kan. 297, 13 Pac. 279. On the former ground, the court's idea seems to be that the fit have an inalienable right to marry; that the state must not impair that right; and that the state does impair it if "it puts the applicant in the position of asking for and receiving, and the physician in the position of giving, services without a reasonable compensation." The defect here is that the physician cannot be compelled to serve at all — *Hurley v. Eddingfield*, 156 Ind. 416, 59 N. E. 1058 — much less to serve without reasonable compensation. Perhaps the court merely means to put the case on the ground that requiring the payment of the fee is the unconstitutional feature of the act.

<sup>1</sup> For a much fuller discussion of the principles here involved, see 23 HARV. L. REV. 37 *et seq.*

<sup>2</sup> *Crippen v. Loughton*, 69 N. H. 540, 44 Atl. 538; *Hancock National Bank v. Far-num*, 20 R. I. 466, 40 Atl. 341.

<sup>3</sup> This analogy, however, suggested in 23 HARV. L. REV. 38, is not wholly satisfying, for the assignor of shares is completely freed from all liability on assignment, while an assignor of a covenant running with the land may remain liable as well as his assignee.

<sup>4</sup> *Flash v. Conn.*, 109 U. S. 371; *Whitman v. Oxford National Bank*, 176 U. S. 559; *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 32 Pac. 756; *First National Bank v. Gustin, etc. Co.*, 42 Minn. 327, 44 N. W. 198; 1 WHARTON, CONFLICT OF LAWS,



anywhere the shareholder can be found, provided, of course, that the statute is not construed as restricting the exercise of the creditor's right to the state where created.<sup>5</sup>

Some apparent exceptions to this rule have been made in recent cases involving the conflict of law, in which it has been held that the California law for personal liability of stockholder to creditor can be enforced by a California creditor against resident shareholders of foreign corporations, although these corporations were incorporated in states exempting the shareholders from all individual liability.<sup>6</sup> The courts, however, explained the apparent inconsistency by the fact that these foreign companies were incorporated to do a California business and that therefore it may be assumed that the stockholders incorporated the California law into their charters, as far as business in that state was concerned, and hence by contract made themselves liable according to the California law. This reasoning seems objectionable in that it is based on fiction. Nevertheless it achieves an eminently just result by preventing evasion of the California law by incorporation abroad. But the doctrine applies with as much force to a non-resident shareholder as to one resident in California. It is most interesting, therefore, to see that in the case of a non-resident the courts refused to apply their former reasoning. When a California creditor sued a New York stockholder of a foreign corporation, doing business in California under authorization of its charter, the New York federal court held he was not liable unless individual authorization of the California business could be found.<sup>7</sup> The Supreme Court of the United States approved the ruling as to the law, but found as a fact that the shareholder individually authorized the acts in California, and so was bound by all the legal consequences given them by the California law.<sup>8</sup> *Thomas v. Matthiessen*, 34 Sup. Ct. 312.

3 ed., § 105b. That the terms of the contract cannot be constitutionally changed as to the shareholder by later enactments increasing his liability, nor as to the creditor by later statutes decreasing it, see *Bernheimer v. Converse*, 206 U. S. 516, 530. But it is possible for either shareholder or creditor to waive his constitutional right by contracting on some other basis, see *Ireland v. Palestine*, etc. Turnpike Co., 19 Oh. St. 369, 373; *Wells v. Black*, 117 Cal. 157, 161, 48 Pac. 1090, 1091.

<sup>5</sup> For a detailed discussion of what creditors' remedies are transitory and what restricted to the jurisdiction creating the corporation, see 1 WHARTON, CONFLICT OF LAWS, 3 ed., § 105b; 23 HARV. L. REV. 37 *et seq.*

<sup>6</sup> *Pinney v. Nelson*, 183 U. S. 144; *Peck v. Noee*, 154 Cal. 351, 97 Pac. 865; *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 110 Pac. 942.

<sup>7</sup> *Thomas v. Matthiessen*, 170 Fed. 362. In deciding against the claims of the California creditor in this case *Martin, J.*, said in part, "To my mind, the only theory under which this defendant can be held liable is by construing the acts of the corporation in doing business in the state of California . . . as an affirmative act on his part whereby he voluntarily became a contracting party, as no state can exercise direct jurisdiction and authority over persons or property without its territory." The judge then decided that "no contractual relation between these parties can fairly be implied." See also the same case in the Court of Appeals, 192 Fed. 495, where the court refused to find an assent to the California law on the ground that the charter of incorporation contained provisions expressly contrary thereto.

<sup>8</sup> In the course of the opinion, Justice Holmes remarked, "While the statutes of California cannot force an agent upon a foreign principal, still, if he has created such an agency in advance, he has come within the jurisdiction by his agent as in other cases of contracts made within a state from outside and will be bound."

This decision shows that there may be an entirely different basis for the liability of a shareholder, namely, his individual responsibility for acts which he has authorized the corporation agents to do abroad. The incorporating state may permit the shareholder to invoke the corporate fiction and by that means shield himself from the usual responsibility for acts he has caused in that state. But it has no power to alter the consequences which the law of another jurisdiction attaches to one who is responsible for an act done there.<sup>9</sup> The foreign state may, if it so wills, refuse to recognize this bar which the incorporating state seeks to place across the ordinary path to responsibility.

What will amount to individual authorization? In a case like the present, where the corporation was formed for the particular purpose of doing California business, there seems no injustice in holding the shareholders as personal authorizers. But where, without any authority from charter or shareholders, the directors start a corporation in business in another jurisdiction where the shareholders' liability is substantially changed, it seems that there is no personal authorization by the stockholders; thus here liability should be limited according to the charter of incorporation interpreted in the light of the law of the creating state.<sup>10</sup> A more difficult case presents itself where the shareholders authorize the directors to generally undertake business abroad, and to conform with foreign laws, and the directors accordingly take action by which the corporation transacts business where shareholders are individually liable. Here the English court has held that the shareholders did not personally authorize the act and denied a foreign creditor relief.<sup>11</sup> It seems, however, that the opposite result would be more just because transacting business under those conditions can probably be said to be within the general authorization.

On theory it would be impossible for a shareholder once personally liable for such acts abroad to thereafter transfer his liability by a transfer of his stock. The new shareholder should be liable for the consequences of the further acts, but all past liability being strictly personal should rest upon the old shareholder. Yet the semi-contractual liability

<sup>9</sup> It is well settled that in the case of principal and agent, a principal authorizing an agent to do acts abroad will be liable for the consequences attached to them by the law of jurisdiction in which the acts are done. *Albion Insurance Co. v. Mills*, 1 Dow. & Cl. 342, 363; *Malpica v. McKown*, 1 La. 248; *Arayo v. Currel*, 1 La. 528; *Baldwin v. Gray*, 4 Mart. N. S. (La.), 192 (principal a partnership); *Maspons v. Mildred*, 9 Q. B. D. 530 (principal undisclosed); *First National Bank of Geneva v. Shaw*, 109 Tenn. 237, 70 S. W. 807 (principal a married woman incapable of contracting by law of her domicile). See *Milliken v. Pratt*, 125 Mass. 374, 376, 3 BEALE, CAS. CONFLICT OF LAWS, p. 515; DICEY, CONFLICT OF LAWS, 2 ed., 609-611; FOOTE, PRIVATE INTERNATIONAL JURISPR., 3 ed., 426, 448 *et seq.*; WESTLAKE, PRIVATE INTERNATIONAL LAW, 4 ed., § 223. The above rule binding a principal for acts of a human agent abroad should be equally applicable to the case where the agent so acting is a corporation.

<sup>10</sup> No case can be found which stands with certainty for the above proposition. *Leyner Engineering Works v. Kempner*, 163 Fed. 605, is a possible authority upon the point, but the facts are not given with sufficient clearness to justify an unqualified citation. Of course the above reasoning is applicable only where the unauthorized act of the directors is *intra vires*. For if *ultra vires* the shareholders should not be liable even according to the terms of the charter, since there is no corporate action. See 23 HARV. L. REV. 510.

<sup>11</sup> *Ridson Iron & Locomotive Works v. Furness*, [1906] 1 K. B. 49.



of a shareholder imposed by the corporation charter is subject to automatic novation, and perhaps on grounds of convenience rather than logic the same result would be reached here.

STATE LEGISLATION TAKING AWAY RIGHTS PREVIOUSLY RECOGNIZED IN ADMIRALTY COURTS. — If a person, receiving injuries on the navigable waters of a state, elects to pursue his remedy in the admiralty court, will recovery be denied him because a state statute purports to extinguish rights based on such injuries? In this question there is necessarily involved the determination of what substantive law the federal admiralty courts apply. Under the common law conception of territorial sovereignty, over a single legal unit known as a state there can be but one sovereign—the state. This sovereign may delegate to another the power of deciding by legislation what rights will be predicated on certain acts done within the state territory, or may allow the representatives of the other sovereign to adjudicate these rights. By the Constitution, the states made a certain delegation of authority to the federal government in relation to maritime matters. Art. III, sec. 2, provides that “The judicial power shall extend to all cases of admiralty and maritime jurisdiction.” Now before the adoption of the Constitution, rights of individuals on the sea were adjudicated in the admiralty court of each state, if the parties chose that rather than the common law forum.<sup>1</sup> Certain rights not known to the common law were recognized by the general maritime law,<sup>2</sup> upon which was based the admiralty law applied in each state admiralty court. Causes of action based on these rights could only be tried in the state admiralty courts. The confusion inevitably resulting from the diversity in the state laws, was the reason for the delegation regarding admiralty matters; and in order to effectually carry out the desire for uniformity in maritime laws shown by the Constitution, there has been implied, with the delegation to the courts, a grant to Congress of power to regulate rights over which the admiralty courts would have jurisdiction.<sup>3</sup> The exact scope of this power is not definitely marked out by the authorities, but its extent would seem to be the same as that of the analogous power over interstate commerce. If this view is sound, Congress has supreme power to regulate the law of all admiralty matters; but, until Congress acts, the maritime law of the individual state where the cause arose will govern; and the states may further enact laws regulating admiralty rights within their borders, on matters as to which uniformity throughout the country is not essential.

On the whole, the decisions and the language of the federal courts seem inconsistent with any other view. The fact that admiralty courts

<sup>1</sup> BENEDICT, ADMIRALTY, SECS. 98-104; HUGHES, ADMIRALTY, SEC. 3.

<sup>2</sup> *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. Rep. 595. The general maritime law, so called, originated much earlier than the common law, and is based on the customs of mariners. Very much as did the law merchant, it became a part of the municipal law of various countries, governing the rights and liabilities of parties to maritime transactions, when such transactions were cognizable in courts of admiralty. See BENEDICT, ADMIRALTY, 4 ed., SECS. 44-49, 105-109; HUGHES, ADMIRALTY, SEC. 2.

<sup>3</sup> *In re Garnett*, 141 U. S. 1, 11 Sup. Ct. Rep. 840.

sometimes apply substantive law based solely on state statutes,<sup>4</sup> is consistent only with the idea that the states have reserved to themselves the power to regulate maritime matters as to which uniformity throughout the country is unnecessary. That Congress has exclusive power to regulate admiralty matters concerning which uniformity is desirable has been squarely held;<sup>5</sup> that its power even over local matters is paramount, if it chooses to act, seems taken for granted.<sup>6</sup> Finally, as there is no federal common law,<sup>7</sup> the substantive law applied in admiralty must be the maritime law of the state, the application of which is delegated to the federal courts.<sup>8</sup>

A recent case holding that a state statute (abolishing the common law liability of employers for injury to employees and substituting therefor a compensation system) was prevented by the Constitution from applying to injuries sustained on navigable waters, seems inconsistent with the above reasoning. *The Fred E. Sander*, 208 Fed. 724. It may be argued that for a state to take away, by legislation, rights formerly adjudicated in admiralty is no less an infringement on the federal jurisdiction than is the recognition of strictly admiralty rights by state courts. But the analogy is misleading, for there is a sharp distinction between the powers of state legislatures, and those of state courts to deal with maritime matters. As seen above, state legislatures have power to act concerning local matters until Congress expresses an intent to exclusively cover the field.<sup>9</sup> But, on the other hand, state statutes allowing proceedings *in rem* in the state courts for marine torts are invalid, because to give common law courts jurisdiction over matters so essentially pertaining to admiralty procedure is to interfere with the exclusive *judicial* power delegated to the federal courts by the Constitution.<sup>10</sup> Since the statute in the principal case, like the state death statutes,<sup>11</sup> seems on a matter as to which uniformity is unnecessary, it is submitted that the decision is erroneous.<sup>12</sup>

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THE PROBLEM OF INDUSTRIAL RAILWAYS. — The services rendered by industrial railways to their proprietary industries may be of three very different kinds. 1. The railway may be a true common carrier and thus be in the position of the initial or ultimate carrier as to the shipper industry. 2. The shipper with the permission of the carrier may perform part of the service that it would otherwise be the duty

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<sup>4</sup> *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. Rep. 498.

<sup>5</sup> *The Roanoke*, 189 U. S. 185, 23 Sup. Ct. Rep. 491.

<sup>6</sup> The language of the courts indicates clearly that if Congress does choose to act in a matter, it is paramount to all state action. See *Butler v. Boston Steamship Co.*, 130 U. S. 527, 556-558, 9 Sup. Ct. Rep. 612, 618-619.

<sup>7</sup> *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92; *Swift v. Phil. Reading R. Co.*, 64 Fed. 59.

<sup>8</sup> See *The City of Norwalk*, 55 Fed. 98-105.

<sup>10</sup> *The Hine v. Trevor*, 4 Wall. (U. S.) 555.

<sup>9</sup> *Supra*, Note 4.

<sup>11</sup> *The Hamilton*, 207 U. S. 398.

<sup>12</sup> The actual holding might be supported on the ground that the statute, by proper construction, has no application at all to workmen injured on navigable waters. But the court deems it necessary to force this construction to prevent the act being unconstitutional. The construction taken certainly was not the natural one, and it is submitted that it was entirely unnecessary. But *Cf. Steamboat New York v. Rea*, 18 How. (U. S.) 223; *The Henry B. Smith*, 195 Fed. 312.



of the carrier to perform, or he may furnish a facility that otherwise the carrier would be obliged to furnish. The most typical instance of this is the case of the shipper who furnishes his own cars. So by means of his industrial railway<sup>1</sup> the shipper may haul the consignments over some part of the route over which it would otherwise be the line carrier's duty to transport them. 3. The services of the railway may be exclusively that of a plant facility. It may be merely part of the appliances and equipment of the plant—engaged in carrying the raw material in process of manufacture from building to building, or from the plant to the line carrier—thus performing services that the carrier is not undertaking to do, any more than if the carriage were by dray.

Where the line carrier makes payments to these industrial railways for services rendered, no objection may properly be interposed, but the enormous drain on the line carrier, and the corresponding burden thus reflected upon other patrons of the line carrier, caused by payments to these railways under the guise of such services, though not in fact performed, is forcefully brought out in *The Industrial Railways Case*, 29 Int. Com. Com. Rep. 212.<sup>2</sup> What service is being rendered is a pure question of fact for the Interstate Commerce Commission. Regardless of the motives<sup>3</sup> which actuate the commission, the problem cannot be attacked on the principle that there should be an equalization of opportunity between the big shipper owning an industrial railway and the smaller ones having merely public spurs or who must content themselves with team tracks. "The law does not attempt to equalize fortune, opportunities, or abilities."<sup>4</sup> Therefore, if services are rendered they must be paid for. It would seem that the commission may lay down reasonable rules to govern its decisions on such questions. But these rules must not amount to legislation. Therefore, while the legislature might have laid down such a rule, it seems that the Commerce Court in *Louisiana & P. Ry. Co. v. United States*, 209 Fed. 244, was clearly right in holding that the commission could not make the question of what services were being rendered by the railway depend on whether or not the goods carried belonged to the proprietary industry.<sup>5</sup> It is true that these railways are usually incor-

<sup>1</sup> An industrial railway is a short line constructed primarily to serve the particular plant in the general interest of which it is owned and operated. *Tap Line Cases*, 23 Int. Com. Com. Rep. 277, 278.

<sup>2</sup> "The cost to the line carriers of the contribution by them in money and services, *per diem* reclaims, and demurrage exemptions to the few favored shippers shown on this record does not appear. It has been estimated at not less than \$15,000,000 a year, and this we regard as conservative." It seems that the investigation was confined to the iron and steel industries east of the Mississippi River.

<sup>3</sup> See article by Bruce Wyman in this issue of the REVIEW at p. 545.

<sup>4</sup> *United States v. Diffenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22; *Louisiana & P. Ry. Co. v. United States*, *supra*, 253.

<sup>5</sup> In the *Tap Line Cases*, *supra*, the commission laid down the following rules:

"1. Switching service within three miles of a trunk line is by custom included in the through rate.

"2. Such switching is a transportation service.

"3. For switching products of a proprietary mill located within the three-mile limit, no division of the through rate may be made, but an allowance under Section 15 may be paid either to the industry or its tap line, if the trunk line prefers to permit the industry or its tap line to do this work.

"4. For switching products of a non-proprietary mill an allowance may be given,

porated as an entity distinct from the industries that control them. This separation into different legal beings must be immaterial when the issue is the determination of what business the entity is engaged in.<sup>6</sup>

If it be determined that the railway is a true common carrier, it is as such entitled to a division of the through rate, the fact that the road is owned by the largest individual shipper over it being of no consequence in this connection.<sup>7</sup>

The determination that the service performed is of the second class, *supra*, i. e., a service performed by the shipper in connection with transportation, depends on two other questions. First, what are the limits of the line carrier's transportation service? Does it extend up to the door of the proprietary mill so that when a shipment starts to move from that point it may be said that the line carrier's obligation as such has begun? This was the situation disclosed by the Tap Line Cases<sup>8</sup> where by custom the carriage extends up to any mill within three miles of the line carrier. Second, is the line carrier permitting the shipper to perform a part of this service that otherwise it would be obliged to do? If so, a fair allowance may be made in accordance with Section 15 of the Interstate Commerce Act.<sup>9</sup> It seems, however, that in the usual case the carrier's line does not extend up to the door of the industry, and that the carrier's obligation is fulfilled by a delivery onto the exchange track or onto a spur just clear

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and in case of a common carrier tap line, a division out of the through rate may be made.

"5. But no allowance shall be made if the proper switching distance is or should be less than 1,000 feet.

"6. The benefit of the blanket rate is to be extended beyond the three-mile switching limit for a mill on or connected by switch (presumably not over three miles long) with a common carrier tap line and through the latter with a trunk line, provided only that the mill be not a proprietary industry as to the tap line. Neither allowance nor division is to be given the tap line for switching the products of such a proprietary mill." *Held*, that these rules were arbitrary. *Louisiana & P. Ry. Co. v. United States*, 209 Fed. 244, 255.

<sup>6</sup> *Crane Iron Works v. Central R. R. of N. Y.*, 17 Int. Com. Com. Rep. 514; *Star Grain, etc. Co. v. Atchinson, etc. Ry. Co.*, *id.* 338; *Tap Line Cases*, *supra*, 292.

<sup>7</sup> *Re Division of Joint Rates*, 10 Int. Com. Com. Rep. 385, 399; *McCloud Lumber Co. v. Southern Pacific R. Co.*, 24 *id.* 89. This situation may be further complicated in the case of what is known as a tap line.

"The rails leading from the mill or through the timber and usually to a logging camp or company town have become known as the main line or 'tap line.' The spurs radiating into the forest from that point or from points along the main line are now usually referred to as the 'logging road.'" *Tap Line Cases*, *supra*, 285. If such a tap line be a common carrier, a through rate may be fixed originating at the timber with a milling-in-transit privilege. *Central Yellow Pine Asso. v. Vicksburg, etc. Ry. Co.*, 10 Int. Com. Co. Rep. 193, 210.

Unless the railway is a true public carrier no division of the through rate may be made. *Star Grain & Lumber Co. v. Atchinson, etc. Ry. Co.*, *supra*. See also *Central Yellow Pine Asso. v. Vicksburg, etc. Ry. Co.*, *supra*, 210.

<sup>8</sup> See note 5, *supra*, rule 14. See also *United States v. Baltimore & Ohio R. Co.*, 231 U. S. 274, 34 Sup. Ct. 75, where a railroad, though its rails ended on the Jersey side, extended its line by lighterage to New York. An analogous situation arises where the carrier furnishes a grain terminal by rental from the owner of an elevator instead of building one of its own. *United States v. Dittenbaugh*, *supra*.

<sup>9</sup> Of course in the matter of allowances or divisions, if so large an amount is paid as to amount to a rebate, or if allowances are made to some and not to others so that there is a discrimination, the problem is different. The question here is, how far may these sums properly be paid?



of the main track. Hence, service beyond that point is not what the carrier is bound to do, but an accessorial service for the benefit of the shipper, *e. g.*, switching and "spotting." Therefore the shipper should pay for it in addition to the through rate rather than be entitled to an allowance out of that rate.<sup>10</sup>

If the railway performs neither of these services, *i. e.*, if it is in Class 3, *supra*, it is merely an adjunct and an integral part of the industry, doing the shipper's work exclusively, and no payment may lawfully be made, as is pointed out both in *Louisiana & P. Ry. Co. v. United States*, *supra*, and *The Industrial Railways Case*, *supra*. This seems clear, for a carrier cannot pay the cost of carriage from a point off its line to a point on its line either for the purpose of getting business that otherwise it would not get or for the sake of developing new territory.<sup>11</sup>

If the industrial railway were performing one and only one of the three services outlined above, the problem would be a comparatively simple one. Usually, however, the carrier is found to be performing at least two of these services, not only for the proprietary industry, but for others. Thus the line of demarcation between the services it is rendering for which the line carrier should pay and those which are purely shippers' services becomes difficult and at times impossible to define.

It was found in *Crane Iron Works v. United States*, 209 Fed. 238, and in *Louisiana & P. Ry. Co. v. United States*, *supra*, that the industrial railways were engaged both in common-carriage and plant service, *i. e.*, carrying on both a public service and conducting a private enterprise. Clearly this may be true, but it would seem that except in an extreme case the commission would be justified in finding that such a situation did not in fact exist, first, because the nature of the businesses are so antagonistic,<sup>12</sup> and second, because in so far as the common carrier is transporting its own goods in interstate commerce it is doing an illegal act, in that it is violating the Commodities Clause.<sup>13</sup> It is clearly inconsistent with its public functions for a public-service corporation to engage in private business.<sup>14</sup> It seems doubtful whether the commission has power to prevent it under its authority to prevent discrimination.<sup>15</sup> But it would seem that the policy back of the Commodities Clause would go far enough to justify legislation compelling a complete severance of the two businesses.<sup>16</sup>

The situation arising when an industrial railway, though not a com-

<sup>10</sup> *Industrial Railways Case*, *supra*, 225. Such seems to be the method of dealing with this situation both in England and Germany. *Id.* 235.

<sup>11</sup> *Wight v. United States*, 167 U. S. 512, 17 Sup. Ct. 822. *Chicago & Alton Ry. Co. v. Same*, 156 Fed. 558, *aff'd* 212 U. S. 563. *Central Yellow Pine Asso. v. Vicksburg, etc. Ry. Co.*, *supra*, 203.

<sup>12</sup> *Prouty, C.*, in *Kaul Lumber Co. v. Central of Ga. Ry. Co.*, 20 Int. Com. Com. Rep. 450, 455 *et seq.*

<sup>13</sup> See *United States v. Baltimore & Ohio R. Co.*, 231 U. S. 274, 34 Sup. Ct. 75. *Industrial Railways Case*, *supra*, 246.

This latter objection, of course, would not be true in the case of tap lines, since timber and its manufactured products are excepted therefrom. *Louisiana & P. Ry. Co. v. United States*, *supra*, 254.

<sup>14</sup> WYMAN, PUBLIC SERVICE CORPORATIONS, § 703 ff.

<sup>15</sup> See Judson, INTERSTATE COMMERCE, § 214.

<sup>16</sup> See note 13, *supra*. See also *Delaware, L. & W. R. Co. v. United States*, 231 U. S. 363, 34 Sup. Ct. 66. Also 21 HARV. L. REV. 595; 22 HARV. L. REV. 250.

mon carrier, is doing plant service and also transportation service on behalf of the shipper under a proper allowance from the line carrier, will present difficulties so long as a shipper is permitted to furnish facilities of transportation in return for an allowance.<sup>17</sup> As has been pointed out above, in nearly every case where an allowance is thus paid for this haulage, the haulage is really done in behalf of the shipper and not the carrier, and therefore improperly paid. That much laxity has been permitted here in the way of allowances and extra services rendered by the carrier without compensation would appear from *The Industrial Railways Case*, *supra*, at page 226.

NEGOTIATION OF BILLS OF LADING UNDER COMMON LAW AND MERCANTILE THEORIES: NATURE OF INTEREST TRANSFERRED. — Misapprehension of the legal consequences of transferring by indorsement a negotiable bill of lading has been a fruitful source of litigation in mercantile communities. The prevailing view at common law is that a negotiation of the document, like a delivery of the goods, conveys only the interest which the parties intend shall pass.<sup>1</sup> But according to the custom of merchants, the person entitled on the face of the document to delivery of the goods, is likewise indicated as owner. To give this custom legal effect some of our principal commercial states have by statute<sup>2</sup> or judicial decision<sup>3</sup> adopted what may be called the mercantile view of documents of title. The results of most cases decided in accordance with this view may be explained on the theory that any one who comes within the terms of the promise to deliver has title to the goods,<sup>4</sup> just as on the better theory of promissory notes, anyone who brings himself within the terms of the promise to pay is conceived to be owner of the obligation.<sup>5</sup> But it seems more accurate to say that title does not pass to a holder who comes within the terms of the promise unless such was the intent. But if the owner of the goods placed the document in circulation, he is estopped by the representation on its face from denying that a *bonâ fide* indorsee for value acquires an indefeasible title.<sup>6</sup> In

<sup>17</sup> WYMAN, PUBLIC SERVICE CORPORATIONS, § 1359.

<sup>1</sup> The *Carlos F. Roses*, 177 U. S. 655; *Straus v. Wessel*, 30 Oh. St. 211.

<sup>2</sup> The most important statutes embodying the mercantile view are the SALES ACT (§§ 27-40), which has been passed in Alas., Ariz., Conn., Md., Mass., Mich., N. J., N. Y., Ohio, R. I. and Wis.; the WAREHOUSE RECEIPTS ACT, passed in Alas., Cal., Col., Conn., D. C., Ill., Ia., Kan., La., Md., Mass., Mich., Minn., Mo., Neb., N. J., N. M., N. Y., Ohio, Ore., Pa., Philippine Is., R. I., S. Dak., Tenn., Vt., Wash., W. Va., and Wis., and the BILLS OF LADING ACT, passed in Alas., Conn., Ill., Ia., La., Md., Mass., Mich., N. J., N. Y., Ohio and Pa. In the latter statute alone is the finder or thief of a document given power to transfer title by indorsement.

<sup>3</sup> *Munroe v. Phila. Warehouse Co.*, 75 Fed. 545; *Comm. Bank v. Armsby*, 120 Ga. 74, 47 S. E. 589; and see *Pollard v. Reardon*, 65 Fed. 848, 849.

<sup>4</sup> This seems to be the principle underlying the following provisions of the BILLS OF LADING ACT: "A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if, at the time of negotiation, the bill is in such form that it may be negotiated by delivery."

<sup>5</sup> See *Peacock v. Rhodes*, 2 Doug. 633, 636; and *Collins v. Martin*, 1 Bos. & P. 648, 651.

<sup>6</sup> *Munroe v. Phila. Warehouse Co.*, *supra*; *Comm. Bank v. Armsby*, *supra*; and see



most cases either explanation is satisfactory, and gives the documents that facility of negotiation which a mercantile community requires.

An owner of goods who transfers a duly indorsed bill of lading to his agent, with no intent to pass title, may under the common-law view assert his title against a *bonâ fide* indorsee of the agent.<sup>7</sup> This right is cut off under the mercantile view,<sup>8</sup> either on the ground that the agent acquires title regardless of the intent, or that the principal is estopped to assert his title against the holder. On the common-law view, a bank advancing money on the faith of an indorsed bill of lading would be an absolute owner, a mortgagee, or a pledgee according to the intent of the parties. Though the indorsement to the bank would be evidence of intent to pass title, a borrower who could prove the contrary might reclaim his property from a *bonâ fide* indorsee for value of the bank.<sup>9</sup> On the other hand, by the mercantile view the indorsee would be protected, and it would be immaterial whether this was because the bank had a title of its own to transfer, or on principles of estoppel.<sup>10</sup>

Where a lender-bank gives up the bill of lading so that the borrower may effect some special disposition of the goods, the bank, to protect itself, usually demands in return a "trust receipt" showing that the borrower has not the full title. Under the common-law view these "trust receipts" are unnecessary, except as evidence of the bank's intent. If the bank had a title, there was no intent to transfer it to the borrower, and the bank could defeat the claim of an indorsee for value of the document or a purchaser of the goods from the borrower.<sup>11</sup> In case the bank had merely a pledge or an unrecorded mortgage, which would be valid only where combined with possession,<sup>12</sup> it is now clear that intrusting the general owner with possession as agent for a special purpose will not estop the security-holder from asserting his interest against a *bonâ fide* purchaser.<sup>13</sup> Under the mercantile view, the "trust receipts" are inadmissible even to show the bank's intent, which will not defeat the title of a *bonâ fide* indorsee of the document surrendered,<sup>14</sup> or any other

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Pollard v. Reardon, *supra*. Under this theory, a thief or finder of the document cannot transfer a good title by negotiation, because the owner, in the absence of negligence, has done no act to produce the representation of title. Shaw v. Railroad Co., 101 U. S. 557.

<sup>7</sup> Fuentes v. Montis, L. R. 3 C. P. 268; Stollenwerck v. Thacher, 115 Mass. 224.

<sup>8</sup> Comm. Bank v. Armsby, *supra*.

<sup>9</sup> The reasoning of the court in *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164, would lead to this result. The court argues that the entire property in the goods was in the borrower, and consequently without the help of an estoppel an indorsee of the bank could acquire no interest.

<sup>10</sup> As a matter of fact, it would seem that the bank usually has a security title, its interest being equivalent to that of a mortgagee in possession. *Seward v. Miller*, 106 Va. 309, 55 S. E. 681; *Comm. Bank v. First State B. & T. Co.*, 153 S. W. 1175 (Tex. Civ. App.); and see *Casey v. Cavaroc*, 96 U. S. 467, 477.

<sup>11</sup> See *Baker v. Brown*, 214 Mass. 196, 199, 100 N. E. 1025, 1026; *Moors v. Bird*, 190 Mass. 400, 77 N. E. 643.

<sup>12</sup> In *Seward v. Miller*, *supra*, the court says: "The bank in such a case stands in the position of a mortgagee in possession, and is not required in order to protect its lien to have the papers recorded."

<sup>13</sup> *Moors v. Wyman*, 146 Mass. 60.

<sup>14</sup> *Pease v. Gloahec*, L. R. 1 P. C. 219; *Munroe v. Phila. Warehouse Co.*, 75 Fed. 545; *R. M. Baker Co. v. Brown*, 214 Mass. 196, 100 N. E. 1025 (decided under the SALES ACT).

negotiable document which the borrower was authorized to take out in substitution therefor.<sup>15</sup> The bank's only protection would be a notice on the face of the document to rebut the representation of title.<sup>16</sup>

In a recent Texas case *non-negotiable* compress receipts, secured by the borrower with proper authority in exchange for *negotiable* bills of lading, surrendered on "trust receipts," were sold to a *bonâ fide* purchaser. The bank was correctly allowed to reclaim the goods. *B. W. McMahan & Co. v. State Bank of Shawnee*, 160 S. W. 403 (Tex. Civ. App.). Since the mercantile view only applies to negotiable documents of title, the compress receipts can have no better standing than the goods themselves. If the goods themselves were sold, the bank's interest would not be cut off, even under the mercantile view, the purpose of which is merely to remove barriers against the free circulation of negotiable documents.<sup>17</sup> The two theories on which the mercantile view is placed do not afford equally satisfactory explanations of this result. If title to the goods was transmitted absolutely to the borrower by the indorsement, there must be an automatic revesting of the bank's interest at the instant when the borrower obtains manual possession of the goods. This cannot be accounted for on legal principles. The logical explanation is that where the bank has represented the borrower as owner on the face of the document, it is estopped from denying the truth of the representation to the damage of one who has given value relying upon it. Mere possession of the goods themselves or of a non-negotiable document does not amount to a representation of title.

## RECENT CASES.

ADMIRALTY — TORTS — EFFECT OF STATE STATUTE ABOLISHING RIGHT RECOGNIZED BY MARITIME LAW. — A state statute abolished the common-law liability of employers for injury to employees and substituted therefor a compensation system. The plaintiff, being injured on a vessel within the state, sued in the admiralty court. *Held*, that the statute does not apply to admiralty causes, as any other construction will make it unconstitutional. *The Fred E. Sander*, 208 Fed. 724.

For an editorial note on the constitutionality of state legislation which takes away rights previously recognized in admiralty courts, see this issue of the REVIEW, p. 578.

AGENCY — NATURE AND INCIDENTS OF THE RELATION — AGENT ACTING FOR TWO PRINCIPALS. — An agent of the defendant insurance company issued a policy on property mortgaged to the plaintiff bank for half its value, "the loss, if any, payable to the mortgagee as his interest might appear."

<sup>15</sup> *Blydenstein v. N. Y. S. & T. Co.*, 67 Fed. 469; *N. Y. S. & T. Co. v. Lipman*, 157 N. Y. 551; *semble, In re Dreuil & Co.*, 205 Fed. 568 (since the borrower was not authorized to take out negotiable receipts for the goods, the shipper was not responsible for the representation they contained).

<sup>16</sup> Such a notice was placed on the bills of lading in *Farmers' & M. Nat. Bank v. Logan*, 74 N. Y. 568; *Dows v. Nat. Ex. Bank*, 91 U. S. 618; *Hieskell v. Farmers' Nat. Bank*, 89 Pa. St. 155.

<sup>17</sup> *Century Throwing Co. v. Muller*, 197 Fed. 252; *Moors v. Wyman*, *supra*; and see *Coker v. First Nat. Bank*, 112 Ga. 71, 73; 37 S. E. 122, 123.



The insurance agent was also cashier of the insuring bank, the insurance company not being aware of this fact. Loss occurred to the property. *Held*, that the insurance company is liable. *Citizens' State Bank of Chautauqua v. Shawnee Fire Ins. Co.*, 137 Pac. 78 (Kan.).

It is not believed that the court's result or reasoning can be supported. *Greenwood Ice & Coal Co. v. Georgia Home Ins. Co.*, 72 Miss. 46, 17 So. 83. See 9 HARV. L. REV. 218. It is argued that there is nothing incompatible in the duties which the agent owed, in regard to this transaction, to his respective principals. If he served the plaintiff in an insignificant capacity, such as watchman, the result might be justified. *Northrup v. Germania Fire Ins. Co.*, 48 Wis. 420. But where he was simultaneously representative of the insurer and cashier of the insured, his dual interests would seem sufficiently antagonistic to invalidate the agreement at least as between the defendant and the bank. See 13 HARV. L. REV. 522, 27 HARV. L. REV. 282.

ATTORNEYS — ADMISSION TO THE BAR — ADMISSION OF WOMEN.— *Held*, that a woman is not eligible as a candidate for admission to the bar. *Bebb v. Law Society*, 50 W. N. (Eng.) 355 (High Ct. of Justice, Chan. Div.).

Some American courts, even without positive statutory enactment, have held women qualified to practice as attorneys. *In re Petition of Leach*, 134 Ind. 665, 34 N. E. 641. *In re Thomas*, 16 Colo. 441, 27 Pac. 707. Others have reached this result only after such enactments. ACTS AND RESOLVES, MASS. 1882, c. 139. *Robinson's Case*, 131 Mass. 376. A recent statute has granted to women the right to practice before the United States Supreme Court. U. S. COMP. STAT. 1901 (Suppl. 1911), Sec. 255. Thus American jurisdictions generally are committed to a view contrary to the unduly conservative stand taken by the English courts. See 8 HARV. L. REV. 174.

CARRIERS — DISCRIMINATION AND OVERCHARGE — INDUSTRIAL RAILWAYS.— *Held*, that the Interstate Commerce Commission is justified on the facts of this case in finding that an industrial railway, operating between the plant of its proprietary industries and the line carrier and serving other industries in addition, was a common carrier as to all others except its proprietary industry, and as to that it was a mere plant facility. *Crane Iron Works v. United States*, 209 Fed. 238.

*Held*, that it was an arbitrary exercise of power for the Interstate Commerce Commission to determine the nature of the service performed by an industrial railway merely by ascertaining whether or not the work was done for the proprietary industry. *Louisiana & P. Ry. Co. v. United States*, 209 Fed. 244.

The general situation of industrial railways and their effect upon the revenues of the public railroads is described in the *Industrial Railway Case*, 29 Inter. Com. Rep. 212. For a discussion of the principles involved in these three recent cases, see this issue of the REVIEW at page 580.

CARRIERS — LIMITATION OF LIABILITY — VALIDITY OF EXEMPTION FROM LIABILITY FOR NEGLIGENCE TO SLEEPING-CAR EMPLOYEES.— A porter on a Pullman car was killed by the negligence of the defendant railroad. Contracts between the porter and the Pullman company, and between that company and the defendant, exempted the latter from all liability for injury to the porter. His widow sues for his death. *Held*, that she may recover, the attempted exemption being against public policy. *Coleman v. Pennsylvania R. Co.*, 89 Atl. 87 (Pa.).

A common carrier, because of the disadvantageous position of the public and the danger of deterioration in service, cannot effectively contract against liability for negligence to a patron. *New York Central R. Co. v. Lockwood*, 17 Wall. (U. S.) 357. See 26 HARV. L. REV. 742. But in services beyond the

scope of its public duty, the carrier contracts as an ordinary member of society, and the general policy of freedom of contract prevails. *Wells v. Steam Navigation Co.*, 8 N. Y. 375. Accordingly, limitation of liability for negligence is effective if the transportation is purely gratuitous. *Kinney v. Central Railroad of New Jersey*, 34 N. J. L. 513; *Quimby v. Boston & Maine R. Co.*, 150 Mass. 365, 23 N. E. 205. The exemption is likewise valid against the employees of a news company or circus, which the railroad carries aside from its public undertaking. *Alexander v. Toronto & N. R. Co.*, 33 U. C. Q. B. 474; *Robertson v. Old Colony R. Co.*, 156 Mass. 525, 31 N. E. 650. Cf. *Poucher v. New York Central R. Co.*, 49 N. Y. 263. The established view has been that a railroad owes no public duty to dependent services such as express and sleeping-car lines. *Express Cases*, 117 U. S. 1; *Chicago, etc. R. Co. v. Pullman, etc. Co.*, 139 U. S. 79. *Contra*, *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430. See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 470 *et seq.* Consequently the authorities uphold contracts exempting the railroad from liability for negligence to express messengers. *Baltimore & O. S. W. Ry. Co. v. Voigt*, 176 U. S. 498; *Blank v. Illinois Central R. Co.* 182 Ill. 332, 55 N. E. 332. The same view prevails with respect to the employees of sleeping-car companies. *Chicago, R. I. & P. Ry. Co. v. Hamler*, 215 Ill. 525, 74 N. E. 705; *Russell v. Pittsburgh, C., C., & St. L. Ry. Co.*, 157 Ind. 305, 61 N. E. 678; *Denver & R. G. R. Co. v. Whan*, 39 Colo. 230, 89 Pac. 39. *Contra*, *Jones v. St. Louis, etc. R. Co.*, 125 Mo. 666, 28 S. W. 883. But a few authorities, including the principal case, take a different view, reasoning that the transportation of dependent services, once undertaken by the railroad, assumes the incidents of ordinary transportation. *Davis v. Chesapeake & O. R. Co.*, 122 Ky. 528, 92 S. W. 339. As to this particular incident, at least, the reasoning seems unsound. The validity of exemption from liability for negligence depends upon its relation to the interests of the traveling public. The law of public service is interested in giving them, and not all those with whom the carrier deals, an opportunity to contract on equal footing. Furthermore the danger that limitation of liability of dependent services will cause deterioration of service to the employees is so slight as to be negligible. Public policy, of course, would forbid a contract exempting the master from liability for negligence to his servant. *Johnston v. Fargo*, 184 N. Y. 379, 77 N. E. 388; *Lake Shore & M. S. R. Co. v. Spangler*, 44 Oh. St. 471. But it is well settled that employees of the Pullman company are not, for this purpose at least, servants of the railroad. *McDermott v. Southern Pacific R. Co.*, 122 Fed. 669; *Chicago, R. I. & P. Ry. Co. v. Hamler*, *supra*. The principal case, therefore, is difficult to support.

CHATTEL MORTGAGES — RIGHTS OF INTERVENING CREDITORS — NECESSITY OF CHANGE OF POSSESSION WHEN GOODS ARE IN HANDS OF PRIOR MORTGAGEE. — Chattels were mortgaged by the owner, and possession given to an agent of the mortgagee. Later a second mortgage was executed to the defendant, the agent of the prior mortgagee agreeing to hold possession for the defendant also. A statute required the recording of chattel mortgages or a change of possession. Neither mortgage was recorded. In an action by the trustee in bankruptcy of the owner, *held*, that the mortgage of the defendant was void. *Moffat v. Beeler*, 137 Pac. 963 (Kan.).

The primary purpose of statutes requiring record of chattel mortgages or a change of possession is to prevent the deception to creditors, caused by the retention of possession by the mortgagor. There is no such danger where the property to be mortgaged is already in the possession of a third party not an agent of the mortgagor. Accordingly it has been held that the necessary change of possession is accomplished by an agreement by the third party to hold possession as agent of the mortgagee. *Nash v. Ely*, 19 Wend. (N. Y.) 523; *Hodges v. Hurd*, 47 Ill. 363. The same rule prevails in the law of sales. *Pierce*



v. *Chipman*, 8 Vt. 334; see *Hallgarten v. Oldham*, 135 Mass. 1, 9. It is submitted that the fact that the third person holds under a prior mortgage should not alter the result. See *Wheeler v. Nichols*, 32 Me. 233. The opinion in the principal case proceeds on the theory that the statute has the further aim of making the change of possession to the mortgagee notice of the specific claim under which possession was taken. But this view goes too far, since it would invalidate even a second unrecorded mortgage to the prior mortgagee in possession. The extent of the incumbrance can be discovered in the principal case as easily as in any case where the goods are in the hands of third parties, who hold for the mortgagees.

COMPOSITION WITH CREDITORS — RESERVATION OF MORAL OBLIGATION — VALIDITY OF SUBSEQUENT PROMISE AFTER COMPOSITION. — The defendant executed a composition with his creditors and reserved a secret moral obligation to pay the plaintiff in full, later making a promise to that effect. The plaintiff sues on the subsequent promise. *Held*, that the later promise is supported by consideration. *Straus v. Cunningham*, 144 N. Y. Supp. 1014 (App. Div.).

An agreement with two or more creditors for part payment in complete satisfaction of debts, validly discharges the old liabilities, substituting the new agreement. *Warren v. Whitney*, 24 Me. 561. Therefore a subsequent promise to pay the balance of the old debt is unenforceable, unless supported by present consideration. *Stafford v. Bacon*, 1 Hill (N. Y.) 533. Recovery is permitted in the principal case, however, on the ground that the moral obligation to pay debts in full is consideration for the new promise; that although the moral obligation, as in the above cases, does not ordinarily survive a voluntary discharge, it is preserved here by the express reservation. *Taylor v. Hotchkiss*, 81 N. Y. App. Div. 470, 80 N. Y. Supp. 1042. After a discharge in bankruptcy, even though the debt is extinguished, a promise to pay the original debt is binding. *Bridgman v. Christie*, 51 N. J. Eq. 331, 25 Atl. 939. Although variously explained, this exception would seem to rest on the ground that there is a public policy in holding the debtor to a reassumed liability, since he has obtained an involuntary discharge through operation of law. There would seem to be an equally strong policy in the case of composition agreements, for the creditors' consent is in effect coerced by their natural desire to escape a general struggle to appropriate the debtor's assets. The court, in distinguishing the present case on the ground that there was an express reservation, shows a tendency to reach this result and avoid the authority of the composition cases.

CONFLICT OF LAWS — RIGHTS AND OBLIGATIONS OF FOREIGN CORPORATIONS — ENFORCEMENT OF INDIVIDUAL LIABILITY OF CORPORATORS. — The defendant, a citizen of New York, agreed to subscribe to stock in a corporation which was to do business in California. The corporation was formed under the Arizona law, its charter expressly exempting the stockholders from personal liability. The charter provided for the carrying on of business in California. The corporation then contracted debts in California, where, by statute, shareholders in foreign corporations were made personally liable. The plaintiff, a California creditor, now sues the defendant stockholder in the federal courts of New York. *Held*, that the defendant is personally liable. *Thomas v. Matthiessen*, 34 Sup. Ct. 312.

For a discussion of the principles involved in the case, see NOTES, p. 575.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — TAKING PROPERTY OR REGULATING ITS USE FOR PUBLIC ESTHETICS. — A city ordinance prohibited the building of retail stores in residential sections without consent of a majority of the frontage owners. *Held*, that the statute is unconstitutional. *People v. Chicago*, 103 N. E. 609 (Ill.).

For an editorial note on whether property may be taken for public esthetics, either because of the police power or by eminent domain, see this issue of the REVIEW, p. 571.

CONTEMPT OF COURT — POWER TO PUNISH — DISOBEDIENCE OF INJUNCTION ORDERED BY APPELLATE COURT, REVERSING LOWER COURT. — A mandatory injunction having been refused by the lower court, the upper court decreed that an injunction issue. The defendants disobeyed this injunction before its formal adoption by the lower court. *Held*, that the lower court has jurisdiction to punish. *Fortescue v. McKeown*, [1914] 1 Ir. Ch. 30.

To obtain jurisdiction to enforce a final judgment rendered in an appellate court at law, the lower court must formally adopt it as its own. *Clapper v. Bailey*, 10 Ind. 160. But on appeal in equity the decree of the appellate court is as though rendered by the court below. The latter therefore has the same jurisdiction over subsequent proceedings as after its own decree. *Sowdon v. Marriott*, 2 Phil. 623; s. c. *Flight v. Marriott*, 12 Jur. 487. The appellate court should not be the one to punish the disobedience of its decree rendered on appeal. *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 124 Fed. 735. An injunction takes effect from the time ordered, and before the formal sealing of the writ. *Rattray v. Bishop*, 3 Madd. 220; *Winslow v. Nayson*, 113 Mass. 411, 420. And it is binding on a party who has actual notice, irrespective of formal entry or service. *Hearn v. Tennant*, 14 Ves. 136; *Poertner v. Russell*, 33 Wis. 193; *Winslow v. Nayson*, *supra*, 420. See also *Daniel v. Ferguson*, [1891] 2 Ch. 27, 29. Since in the principal case the defendant's knowledge of the order appears unquestionable, the lower court clearly had power to punish, and its refusal on jurisdictional grounds was error. However, in the absence of formal service, the lower court should be sure that there is actual notice of the order. *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, *supra*, 736. And since the failure to obey a mandatory injunction generally results only in a continuance of the *status quo*, to refuse to punish until formal service, which can be easily procured, would seem well within the court's discretion. Disobedience of a restraining order is obviously different.

CORPORATIONS — TORTS AND CRIMES — LIABILITY FOR LARCENY. — The Tyson Ticket corporation purchased, on behalf of a customer, two season tickets for the Metropolitan Opera at New York. It then pledged these tickets to secure a loan to itself. *Held*, that the corporation may be convicted of larceny. *People v. Tyson & Company, Inc.*, 50 N. Y. L. J. 1829 (City Magistrates' Ct., N. Y., Jan., 1914).

If allowed to stand, this will be the first conviction of a corporation for felony. As such, it is opposed by two modern decisions. *Commonwealth v. Punxsunawney Street Passenger R. Co.*, 24 Pa. Co. Ct. 25; *Queen v. Great West Laundry Co.*, 13 Manitoba, 66. But four earlier cases hold corporations liable for misdemeanors involving criminal intent. *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1; *United States v. John Kelso Co.*, 86 Fed. 304; *Grant Bros. Construction Co. v. United States*, 13 Ariz. 388, 114 Pac. 955; *United States v. McAndrews & Forbes Co.*, 149 Fed. 823. The cases argue that since a corporation is liable for wilful torts of its agents, therefore its agents' criminal intent must be "imputed" to a corporation charged with crime. *Green v. London General Omnibus Co.*, 7 C. B. N. S. 290; *Reed v. Home Savings Bank*, 130 Mass. 443. But the ground of civil responsibility in the cases cited is not that an actual malicious intent is "imputed" to the corporation. Every master is liable for his agents' wilful torts committed in an attempt to accomplish the purposes of the employment, on grounds wholly independent of the master's state of mind. *Bergman v. Hendricksen*, 106 Wis. 434, 82 N. W. 304; see 1 CLARK & SKYLES, AGENCY, § 493. Yet clearly he is not held for his servant's crimes



— where a criminal mind is an essential element — unless he has personally participated. *Commonwealth v. Nichols*, 10 Metc. (Mass.) 259; see 1 CLARK & SKYLES, AGENCY, § 520. It must follow that corporations can be held for such offenses only by applying *respondeat superior* to them where it does not apply to individuals, or else by treating the acts of its governing officers as the personal acts of the corporation itself. No court has ever expressly adopted the first alternative, and it cannot be justified unless — as seems doubtful — the law fails to apply *respondeat superior* to all crimes merely out of tenderness to innocent human employers. See *Commonwealth v. Wachendorf*, 141 Mass. 270, 271, 4 N. E. 817, 818. But there is reason to think that the second alternative is the law. The Supreme Court holds corporations liable in exemplary damages for the torts of their "officers," but not for those of their "agents." *Denver & Rio Grande Ry. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286; *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261. A few other cases hold that corporations act *per se* through their officers. *American Soda Fountain Co. v. Stolzenbach*, 75 N. J. L. 721, 68 Atl. 1078; *Bank of Toronto v. McDougall*, 15 U. C. C. P. 475. This idea seems sensible. Abandoning the notion that a corporation is an ideal being and treating it simply as an organization of men, the officers by which that organization acts appear as integral parts of the corporation, and their official acts as the immediate acts of the corporation itself. See 21 HARV. L. REV. 535. Apparently some regular officer was concerned in every crime involving an evil intent of which a corporation has yet been convicted. It is believed that these decisions are correct in result and represent an unconscious adoption of the principle which the Supreme Court has applied to the case of exemplary damages.

CRIMINAL LAW — EFFECT OF UNAUTHORIZED POSTPONEMENT OF EXECUTION. — After legally sentencing the petitioner to two years' imprisonment, the trial court illegally gave him his liberty on condition that he leave the state. After two years he returned. *Held*, that he must serve the original sentence. *Ex parte Lujan*, 137 Pac. 587 (N. Mex.).

Illegal delay in sentencing one convicted permanently deprives the court of its jurisdiction to pronounce sentence. *People v. Barrett*, 202 Ill. 287, 67 N. E. 23; *United States v. Wilson*, 46 Fed. 748. Some courts have given like effect to illegal postponement of execution of sentence, after the time the sentence should have expired if served. *In re Webb*, 89 Wis. 354, 62 N. W. 177; *Ex parte Clendenning*, 1 Okla. Cr. 227, 97 Pac. 650. The cases seem clearly distinguishable. A valid sentence having been imposed, the prisoner is illegally at large. Sentence is not satisfied when the prisoner is at liberty after escape. *Dolan's Case*, 101 Mass. 219. Nor when liberty is due to the neglect of the sheriff. *Miller v. Evans*, 115 Ia. 101, 88 N. W. 198. There seems to be no reason for distinguishing the illegal act of the court. And the principal case is supported by authority. *Fuller v. State*, 1 Miss. 811, 57 So. 806; *Neal v. State*, 104 Ga. 509, 30 S. E. 858.

COVENANTS RUNNING WITH THE LAND — COVENANTS IN SUPPORT OF AN EASEMENT — AFFIRMATIVE COVENANTS IN EQUITY. — A. granted land to B. with an easement to take power from a water wheel on A.'s adjoining land. A. also covenanted to construct and maintain a shaft from the wheel to B.'s land. The plaintiff, the grantee of B., sought enforcement against A.'s grantee. *Held*, that the defendant is bound as to the easement but not as to the covenant. *Miller v. Clary*, 103 N. E. 1114 (N. Y.).

The New York courts have previously held that an affirmative covenant runs with the land in equity if it is such as can be enforced according to the ordinary rules of specific performance. See 14 HARV. L. REV. 301. This has been the prevailing American view. See 22 HARV. L. REV. 597. The

English authority, which the principal case expressly follows, is *contra*. *Ibid*. But covenants in support of an easement according to the American view run at law as well as equity. *Denman v. Prince*, 40 Barb. (N. Y.) 213; see 23 HARV. L. REV. 298. The principal case, therefore, not only overrules the earlier cases as to affirmative equitable servitudes, but adopts the English view that an easement does not make sufficient privity of estate to permit the burden of a covenant to run at law.

INSURANCE — CONSTRUCTION AND OPERATION OF CONDITIONS — EFFECT OF TEMPORARY BREACH NOT CONTRIBUTING TO LOSS. — The insured in his application agreed not to engage in the business of handling electric wires and dynamos for one year following the date of the policy. The policy expressly made the application a part of the contract of insurance. The insured did enter the business during the year, and his death occurred while so engaged after the expiration of the year. *Held*, that the beneficiary may recover. *Edmonds v. Mutual Life Insurance Co.*, 144 N. W. 718 (S. D.).

The breach of a material representation or a warranty as to a present fact, though not contributing to the loss, avoids an insurance policy. *McGowan v. Supreme Court of Independent Order of Foresters*, 104 Wis. 173, 80 N. W. 603; *Johnson v. Maine & New Brunswick Ins. Co.*, 83 Me. 182, 22 Atl. 107. The same rule applies to the breach of a condition or promissory warranty continuing to the time of the loss. *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551; *Hill v. Middlesex Fire Ins. Co.*, 174 Mass. 542, 55 N. E. 319. *Contra*, *Joyce v. Maine Ins. Co.*, 45 Me. 168. Likewise the policy is void if the breach existed from the outset even if it ceased before and had no causal connection with the loss. *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358. When such a temporary breach, however, arises after the issuance of the policy, there is a conflict of authority. The English courts hold that the policy is void. *De Hahn v. Hartley*, 1 T. R. 343; *Birrell v. Dryer*, 9 A. C. 345; STAT. 6 EDW., VII, c. 41, § 34 (2). The better American view is in accord. *Douglas v. Knickerbocker Life Ins. Co.*, 83 N. Y. 492; *Moore v. Phoenix Ins. Co.*, 62 N. H. 240; *Kyte v. Commercial Union Ins. Co.*, 149 Mass. 116, 21 N. E. 361. Many cases apparently holding that the policy is merely suspended are distinguishable because the policy expressly so provided or no real breach occurred. *Union Life Ins. Co. v. Hughes' Adm'r.*, 110 Ky. 26, 60 S. W. 850; *Kircher v. Milwaukee Mutual Ins. Co.*, 74 Wis. 470, 43 N. W. 487. But some courts clearly hold with the principal case. *Sumter Tobacco Co. v. Phoenix Ins. Co.*, 76 S. C. 76, 56 S. E. 654; *Insurance Co. of North America v. Pitts*, 88 Miss. 587, 41 So. 5. As the application in the principal case was incorporated as a part of the insurance contract, its promises become warranties in the policy. *Mutual Life Ins. Co. v. Kelly*, 114 Fed. 268. The effect then is the same as if the policy expressly provided for forfeiture on a breach by the insured. *Brignac v. Pacific Mutual Life Ins. Co.*, 112 La. 574, 36 So. 595. The view in accord with the principal case, therefore, disregards the stipulations of the contract and causes the insurance to be continued on a different basis from that intended. A statute rather than judicial legislation seems the proper way to prevent forfeiture in such cases, if that be desired. See HOWELL'S MICH. STATS, § 8348; IOWA CODE, § 1743.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — FEDERAL EMPLOYERS' LIABILITY ACTS — EMPLOYEES PROTECTED BY ACT. — The plaintiff's intestate, a locomotive fireman, had prepared his engine for a trip between two points within a state, the train containing cars which had just arrived from another state. While on the company's premises, but before the journey had actually begun, the deceased was run over and killed. The accident was due to the negligence of a fellow servant. Action was brought, but not in proper form for



recovery under the Federal Employers' Liability Act. *Held*, that the deceased was engaged in interstate commerce. *North Carolina R. Co. v. Zachary*, 34 Sup. Ct. 305.

The plaintiff was assisting in the repair of a railway locomotive, which was regularly used in interstate commerce, but had been under repair for three weeks. Due to the negligence of a fellow servant, the plaintiff was injured, and sued the defendant company under the Federal Employers' Liability Act. *Held*, that the plaintiff was engaged in interstate commerce within the terms of the act. *Law v. Illinois Cent. R. Co.*, 208 Fed. 869 (C. C. A., 6th Cir.).

The Federal Act of 1908 abolishes the fellow-servant rule for employees of a railroad engaged in interstate commerce, while themselves engaged in such commerce. 35 STAT., 65, c. 149. Just when an employee is so engaged is a difficult question. Whether the work in question was part of the interstate commerce in which the carrier was engaged was suggested as a test by the majority of the court in *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 152. An employee has been held within the act when on the employer's premises but before actually beginning work. *Lamphere v. Oregon R. & N. Co.*, 196 Fed. 336. In the first of the principal cases, the employee had already begun work. An employee piloting an engine to a track where it will be attached to an interstate train is engaged in interstate commerce. *Norfolk & W. Ry. Co. v. Earnest*, 229 U. S. 114. That the deceased was likewise engaged seems clear. The opinion is also authority for the proposition that hauling empty cars from one state to another is interstate commerce. This is in harmony with *dicta* as to the Safety Appliance Act. See *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, 21; *Voelker v. Chicago, M. & St. P. Ry. Co.*, 116 Fed. 867, 874. Likewise a caretaker of a dead engine on an interstate journey was held to be within the protection of the Liability Act. *Atlantic, etc. R. Co. v. Jones*, 63 So. 693 (Ala. Ct. App.). Finally the Supreme Court answers in the affirmative the question as to whether an employee when injured must bring his action under the federal statute. See THORNTON, EMPLOYERS' LIABILITY AND SAFETY APPLIANCE ACTS, § 19. The second case also seems correct. Workmen engaged in repairs on roads and bridges have been held within the act. *Pederson v. Delaware, L. & W. Ry.*, *supra*; *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893; *Central R. Co. of N. J. v. Colasurdo*, 192 Fed. 901. *Contra*, *Taylor v. Southern Ry. Co.*, 178 Fed. 380. Temporary repairs on a car engaged in interstate service are treated in the same way. *Darr v. Baltimore & O. R. Co.*, 197 Fed. 665. If the instrumentality has never been used in interstate commerce the act could be held not to apply. But once in, it seems hard to find a point where the engine or car, because of temporary withdrawal, loses its interstate character. The same result is reached in *Northern Pac. Ry. Co. v. Maerkle*, 198 Fed. 1. *Heimbach v. Lehigh Valley R. Co.*, 197 Fed. 579, *contra*, depends upon *Pederson v. Delaware, L. & W. R. Co.*, 197 Fed. 537, since overruled by the Supreme Court decision, *supra*. See 26 HARV. L. REV. 354.

LANDLORD AND TENANT — CONDITION OF PREMISES — LESSOR'S LIABILITY TO GUEST IN LEASED HOTEL. — The defendant was owner of a hotel and leased it for one year. At the time of the lease there was a concealed defect in the elevator of which the defendant should have known in the exercise of due care. The lessee, knowing of the defect, continued to operate the elevator in its defective condition. The plaintiff, a guest at the hotel, was injured as a result of this defect. *Held*, that the defendant is liable. *Colorado Mortgage & Investment Co. v. Giacomini*, 136 Pac. (Col.) 1030.

In the absence of an express agreement the lessor does not warrant the condition of the premises. *Bowe v. Hunking*, 135 Mass. 380; *Towne v. Thompson*, 68 N. H. 317, 44 Atl. 492. But the landlord is bound to warn the tenant against

known hidden defects, which the latter could not have discovered in the exercise of reasonable care. *Moore v. Parker*, 63 Kan. 52, 64 Pac. 975; *Howard v. Washington Water Power Co.*, 134 Pac. (Wash.) 927. The landlord owes no affirmative duty to detect and warn the tenant against hidden defects. *Whitmore v. Orono Pulp & Paper Co.*, 91 Me. 297, 39 Atl. 1032; *Shinkle, Wilson, & Kreis Co. v. Birney & Seymour*, 68 Oh. St. 328, 67 N. E. 715; *Hines v. Wilcox*, 96 Tenn. 148, 33 S. W. 914, 100 Tenn. 538, 46 S. W. 297, *contra*. The landlord ordinarily owes no greater duty to the tenant's employees, licensees, and business guests than to the tenant. The latter, having control of the premises, must be the one to warn them against hidden defects. *O'Brien v. Capwell*, 46 Barb. (N. Y.) 497; *Meade v. Montrose*, 160 S. W. (Mo.) 11; *Bailey v. Kelly*, 86 Kan. 911, 122 Pac. 1027, *contra*. Some cases seem to hold, that where the landlord leases premises for a specific use he is liable if they are not fit for that use. *Godley v. Hagerty*, 20 Pa. 387; *Carson v. Godley*, 26 Pa. 111. But so broad an exception to the general rule is not supported by the weight of authority. See *Jaffe v. Harteau*, 56 N. Y. 398, 401. Where, however, the owner leases premises for a public or quasi-public purpose, the public comes upon the premises in response to the implied invitation of the lessor and the latter owes a duty to the public to have the premises in suitable condition for that purpose at the time of the demise. *Fox v. Buffalo Park*, 47 N. Y. Supp. 788, 21 App. Div. 321; *Barrett v. Lake Ontario Beach Improvement Co.*, 174 N. Y. 310, 66 N. E. 968; *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620. See also, 44 AM. LAW REG. 273, 276.

**LIMITATION OF ACTION — NEW PROMISE AND PART PAYMENT — EFFECT OF PAYMENTS BY SURETY OF CLAIM ASSIGNED AS SECURITY.** — The defendant made a note to the plaintiff, and assigned him a claim against an insolvent bank as security. Later there was a payment to the plaintiff by the receiver of the bank. After the period of limitation has run upon the note, the plaintiff sues upon it. *Held*, that the payment does not toll the Statute of Limitations. *Security Bank v. Finkelstein*, 145 N. Y. Supp. 5 (Sup. Ct., App. Div.).

The defense of the Statute of Limitations can always be waived by the debtor, and a part payment is often a sufficient waiver. There must, however, be such an acknowledgment of the debt, by words or part payment, as fairly to imply a promise to pay the balance. *Linsell v. Bonsor*, 2 Bing. N. C. 241; *Chambers v. Garland*, 3 Greene (Ia.) 322. But the authority of the debtor must be found before any promise can be implied, and accordingly it is held that an acknowledgment of the debt by one of several joint debtors will not bind the others. *Bush v. Stowell*, 71 Pa. 208; *Boynton v. Spafford*, 162 Ill. 113, 44 N. E. 379. Nor will a payment by his assignee for creditors bind a debtor. *Marienthal v. Mosler*, 16 Oh. St. 566; *Pickett v. King*, 34 Barb. (N. Y.) 193. The argument of the considerable minority opposed to the principal case, is that the creditor has been made the debtor's agent to collect the collateral debt and apply it in payment, and that such a payment should bind the debtor, on the principles of agency. *Bosler v. McShane*, 78 Neb. 86, 113 N. W. 998; *Buffinton v. Chase*, 152 Mass. 534, 25 N. E. 977. It is hard to see, however, how the agency can be construed so broadly as to include a promise to pay the rest of the debt. Accordingly the principal case and the slight majority with it would appear to hold the better view. *Brown v. Latham*, 58 N. H. 30; *Wolford v. Cook*, 71 Minn. 77, 73 N. W. 706.

**MALICIOUS ABUSE OF PROCESS — EFFECT OF BAD MOTIVE — TERMINATION OF PRIOR SUIT IN MALICIOUS PROSECUTION.** — For the purpose of preventing a sale of the plaintiff's real estate, the defendant brought suit against the plaintiff to collect alleged commissions, and levied an attachment on the property. Before the termination of this action, the plaintiff sues for abuse

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of process. *Held*, that the plaintiff may recover. *Malone v. Belcher*, 103 N. E. 637 (Mass.).

Malicious abuse of process is defined as the employment of legal process for a purpose not designed by law. See COOLEY ON TORTS, 2 ed., p. 220. Under this broad definition any suit brought maliciously would be malicious abuse of process. The action must be more restricted. Two elements would seem essential: an ulterior motive, and an act in the use of process not proper in the proceeding. *Jeffery v. Robbins*, 73 Ill. App. 353; see *Pittsburg, etc. R. R. v. Wakefield Hardware Co.*, 143 N. C. 54, 58, 55 S. E. 422, 424. It may be admitted that the wrong is as great in the principal case, where the ulterior motive, the prevention of the sale, is accomplished by the mere attachment, as in cases where a further act is done. But the right to use the machinery of the law to enforce a valid claim is a right so absolute that bad motive will not remove the justification. *Docter v. Riedel*, 96 Wis. 158, 71 N. W. 119. So where a bankruptcy petition was presented by the defendant, on a valid act of bankruptcy, no action arises, though his sole motive was to exclude the plaintiff from a partnership. *King v. Henderson* [1898], A. C. 720. The moment, however, the defendant does some act beyond the process, such as coercing the plaintiff to do something which has no reference to the proceeding, his justification fails, and an action lies. *Graingee v. Hill*, 4 Bing. (N. C.) 212. As there was no further act in this case, it fails as an action for abuse of process. *Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228. Nor can the action be maintained as for malicious prosecution. The elements for such an action are malice, want of probable cause, and generally termination of the prior action. Termination of the prior action must be shown wherever the issue involved therein is material in the present suit. The possibility of inconsistent results and the objection of trying a pending issue collaterally require this. In jurisdictions where the process of attachment is restricted to cases of fraud, the issue in the prior action need not be raised, and no termination is necessary. *Fortman v. Rottier*, 8 Oh. St. 550; *Brand v. Hinchman*, 68 Mich. 590, 36 N. W. 664. But in Massachusetts the requirements for attachment are merely the same as those in the principal action itself. Thus the issue in the principal suit is necessarily involved in the malicious prosecution suit, and termination must be shown. *Wilson v. Hale*, 178 Mass. 111, 59 N. E. 632.

MASTER AND SERVANT — DUTY OF MASTER TO PROVIDE SAFE APPLIANCES — PREMISES LEASED BEFORE INJURY BUT WITHOUT SERVANT'S KNOWLEDGE. — The plaintiff's intestate, while employed about the defendant's coal docks, was injured by a defective appliance. Prior to the accident the defendant had leased the docks to another, but this fact was unknown to the plaintiff's intestate. *Held*, that the defendant is liable. *Benson v. Lehigh Valley Coal Co.*, 144 N. W. 774 (Minn.).

An employer's duty to furnish safe appliances, whether it sounds in contract or in tort, grows out of the relationship of master and servant. See 3 LABATT, MASTER AND SERVANT, § 898. Since a man cannot avoid his contractual liabilities by disposing of his business, (*Perry v. Simpson, etc. Co.*, 37 Conn. 520) if the employer be considered as impliedly contracting to furnish safe appliances, the fact of the lease should not discharge that liability. If the duty is in tort, the same result follows. The fact of the relationship creates the duty. See *Ford v. Fitchburg R. Co.*, 110 Mass. 240, 260. And as long as the service continues, the employer must fulfill that duty. That the service did continue in the principal case seems clear. If the relation is merely consensual, it should terminate only on notification. If it is considered contractual, some courts even require express or implied consent. See *Missouri R. Co. v. Ferch*, 18 Tex. Civ. App. 46, 49; 44 S. W. 317, 319. But the better view is that dismissal alone terminates the service relation, although the

contractual obligations, such as to pay wages, continue unless ended by mutual consent. *Champion v. Hartshorne*, 9 Conn. 564. At any rate, notice of some kind is essential. The principal case is supported by the weight of authority. *Delaware, L. & W. R. Co. v. Hardy*, 59 N. J. L. 35, 34 Atl. 986. *Missouri R. Co. v. Ferch*, *supra*. See *Solomon R. Co. v. Jones*, 30 Kan. 601, 603, 2 Pac. 657, 658. But there are some decisions *contra*. *Crusselle v. Pugh*, 67 Ga. 430. *Smith v. Belshaw*, 89 Cal. 427, 26 Pac. 834. It is no hardship that the defective appliances are without the defendant's control, for he can avoid all liability by simply notifying the servant. The principle of estoppel is not involved. See *Missouri R. Co. v. Ferch*, *supra*.

NEGLIGENCE — DUTY OF CARE — TRESPASSERS: TRESPASSING CHILDREN ON RAILROAD TRACK. — The plaintiff, an infant of seven years, while trespassing on the tracks of the defendant railroad, was run down by an engine. The lower court directed a nonsuit on the ground that the defendant owed an infant "no higher degree of care than it owed anybody else who was wrongfully on its right of way." Held, that this is error. *Piepkke v. Philadelphia & Reading R. Co.*, 89 Atl. 124 (Pa.).

It does not appear that the plaintiff's presence was observed. If it was not, a nonsuit was proper, for there is no duty in Pennsylvania to look for trespassers. *Philadelphia & Reading R. Co. v. Hummell*, 44 Pa. 375; *Brague v. Northern Central Ry. Co.*, 192 Pa. 242, 43 Atl. 987. On the supposition that the plaintiff was seen, according to the Pennsylvania cases, the proprietor's only duty would be to refrain from inflicting wilful or wanton injury. *Little Schuylkill Navigation R. Co. v. Norton*, 24 Pa. 465; *Mulherrin v. Delaware, etc. R. Co.*, 81 Pa. 366. (For a clear statement of this rule, see *Maynard v. Boston & Maine R.*, 115 Mass. 458; also article by Judge Peaslee, 27 HARV. L. REV. 403.) See *Philadelphia & Reading R. Co. v. Hummell*, *supra*, 379; *Pennsylvania R. Co. v. Morgan*, 82 Pa. 134, 141. But the reasoning of the principal case might lead one to believe that mere negligence would impose liability where the trespasser was an infant, while wilful or wanton conduct was necessary in case he was an adult. This is not so on principle, or authority, as is shown by cases in the same jurisdiction. *Cauley v. Pittsburgh, etc. Ry. Co.*, 95 Pa. 398; *Moore v. Pennsylvania R. Co.*, 99 Pa. 301. See *Emerson v. Peteler*, 35 Minn. 481, 484; also article by Judge Smith, 11 HARV. L. REV. 349, 367. The proper analysis would seem to be that the trespasser's capacity is merely one fact bearing upon whether the defendant's conduct was wanton or wilful. However, the court says, following *Philadelphia & Reading R. Co. v. Spearen*, 47 Pa. 300, 304, if an adult be seen on the track, it would not be wanton conduct not to stop the train, because it may be assumed he will remove himself from danger; but if a child trespasser be seen, the train ordinarily should be stopped immediately. But see *Pennsylvania R. Co. v. Morgan*, *supra*, 141. Accordingly, the court's result, that a jury should be allowed to pass on the evidence, seems supportable.

PARDON — CONDITIONAL PARDON OR PAROLE — STATUTE GIVING COURT POWER TO GRANT. — The petitioner was legally convicted and sentenced to six months' imprisonment. Under a statute authorizing courts to parole prisoners "upon such conditions and under such restrictions" as they "might see fit to impose," the trial court released him, on the condition, among others, that he make reports of his conduct at stated intervals for two years. More than six months later he broke the conditions. Held, that the court had no power to recommit him. *In re Welch*, 137 Pac. 975 (Kan.).

Some courts apparently regard it as legally impossible to subject a paroled convict to the restraints of his parole after his term of imprisonment should have expired if served. *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047;



*Scott v. Chichester*, 107 Va. 933, 60 S. E. 95. One argument made is that, by the very terms of the sentence, no confinement is legal after the date fixed for its expiration. See *Woodward v. Murdock*, *supra*; *Scott v. Chichester*, *supra*. This overlooks the fact that the date of termination is significant only as fixing the quantum of time to be served. *Ex parte Ridley*, 3 Okla. Cr. 350, 360, 106 Pac. 549, 553; *State v. Horne*, 52 Fla. 125, 135, 42 So. 388, 391. More plausibly it is argued that since one paroled must conform to certain restrictions he is not technically free and must therefore be considered as serving the sentence. *Woodward v. Murdock*, *supra*. But time on parole is obviously not equal to time served, and consent to postponement of the punishment seems valid, even if consent to the conditions is not. There seems to be no reason why general power to grant parole should not include power to make its conditions operative indefinitely, or for any specified period. *In re Kelley*, 155 Cal. 39, 99 Pac. 368; *State v. Horne*, *supra*. Such a conditional parole should perhaps be strictly construed in the prisoner's favor. *Huff v. Dyer*, 4 Oh. Cir. Ct. R. 595. The same may be said of a statutory power to grant conditional parole. *In re Prout*, 12 Idaho, 494, 86 Pac. 275. Upon such a liberal construction the principal case seems correct.

PLEDGES — TRANSFER OF POSSESSION — CONSTRUCTIVE DELIVERY BY TRANSFER OF DISTILLING RECEIPTS. — A distilling company, having stored spirits in its own distillery warehouse as required by Federal statute, issued warehouse receipts for the same and indorsed them to the plaintiff bank as security for a loan. *Held*, that as against the trustee in bankruptcy a valid pledge was created. *Taney v. Penn National Bank of Reading*, U. S. Sup. Ct., Jan. 26, 1914.

To constitute a valid pledge there must be an actual or constructive delivery of possession. *Seymour v. Colburn*, 43 Wis. 67. The delivery of a warehouse receipt is ordinarily sufficient. *Bush v. Export Storage Co.*, 136 Fed. 918. But if issued by the owner of the goods himself, it is in no way a symbol of them; and its delivery is ineffectual. *Thorne v. First National Bank*, 37 Oh. St. 254; *Valley National Bank v. Frank*, 12 Mo. App. 460; *Yenni v. McNamee*, 45 N. Y. 614. The opposite view seems incorrect even when the owner is actually a warehouseman. *Bank v. Jagode*, 186 Pa. St. 556, 40 Atl. 1018. But see *State v. Robb-Lawrence Co.*, 17 N. D. 257, 115 N. W. 846. By federal statute every distiller is required to provide a warehouse in which his spirits must be stored under government supervision until the government tax is paid. U. S. REV. STAT., §§ 3247-3334. Warehouse receipts issued under such circumstances have been treated, as in the principal case, as valid symbols of possession. *Merchant's National Bank v. Roxbury Distilling Co.*, 196 Fed. 76. *Contra*, *Conrad v. Fisher*, 37 Mo. App. 352. But the government is not a bailee, and the owner is still in control. In substance, therefore, such a receipt amounts to nothing more than a promise on the part of the possessor to hold the goods as security. Accordingly, it is difficult to find any actual pledge. It seems, however, that the promisee should have an equity based on a right to specific performance. See article by Professor Williston, 19 HARV. L. REV. 557, 583. *Union Trust v. Trumbull*, 137 Ill. 146, 27 N. E. 24. But such an equitable right, secretly encumbering the property, is invalid against a trustee in bankruptcy. *Fourth St. National Bank v. Millbourne Mills*, 172 Fed. 177; *American Can Co. v. Erie Preserving Co.*, 171 Fed. 540. A recognized custom to so use distilling receipts would safeguard against the giving of credit on the ostensible ownership of the possessor, and it seems that the equity should prevail.

POLICE POWER — INTEREST OF PUBLIC HEALTH — CONSTITUTIONALITY OF EUGENIC MARRIAGE LAWS. — A Wisconsin statute forbids the county clerk

to issue a marriage certificate to any male applicant who does not produce a physician's certificate stating the applicant to be free from acquired venereal diseases, and provides that the physician's fee for such examinations shall not exceed three dollars. *Held*, that the statute violates Article 1, section 1, and Article 1, section 18, of the Wisconsin Constitution. *Peterson v. Widule*, (Circuit Ct. of Milwaukee County, Wis.). Not officially reported.

The probability that other states will enact statutes modeled after the one held invalid in the principal case gives rise to a discussion of such statutes from the point of view of the Fourteenth Amendment and similar provisions in state statutes. See NOTES, p. 573.

SALES — TITLE OF GOODS SUBJECT TO BILL OF LADING — BILL OF LADING AS SECURITY FOR ADVANCES; NATURE OF PLEDGEE'S INTEREST — EFFECT OF SURRENDER ON A "TRUST RECEIPT." — The plaintiff bank advanced money on the security of several order bills of lading duly indorsed. Subsequently in return for a receipt it indorsed and delivered the bills to the original owner of the goods to effect a transfer of the goods to a warehouse. The owner sold the non-negotiable warehouse receipts he received on deposit of the goods to the defendant. *Held*, that the plaintiff is entitled to the goods. *B. W. McMahan & Co. v. State Nat. Bank*, 160 S. W. 403 (Tex. Civ. App.).

For a discussion of the application of the mercantile view of negotiable documents of title, see NOTES, p. 583.

TITLE OWNERSHIP AND POSSESSION — POSSESSION — CONTROL OF SAFE DEPOSIT COMPANY OVER SECURITIES IN BOX OF DEPOSITOR. — An action was brought by the State of New York to recover a penalty under the Inheritance Tax Act, which provided that no safe-deposit company, "having in possession or under control" securities of a decedent, should transfer them to the legal representative without first notifying the Comptroller. The defendant company had allowed the removal of securities from a safety-deposit box without notice. They controlled access to the vault, but the decedent and his agent held the only keys to the box. It was claimed by the defendant that they did not have the securities "in possession or under control." *Held*, that the defendant is not liable. *People v. Mercantile Safe Deposit Co.*, 159 N. Y. App. Div. 98 (N. Y. Sup. Ct., App. Div., 1st Dept.).

The Supreme Court of Illinois under a similar statute recently decided squarely the opposite where the bank had one key and the depositor another, both of which were necessary for access to a safe-deposit box. *National Safe Deposit Co. v. Stead*, 250 Ill. 584. The Supreme Court of the United States in reviewing this decision held that the vault owner had sufficient control to prevent the statute from being unconstitutional as an arbitrary attempt to impose the liabilities of possession when none existed. 34 Sup. Ct. Rep. 209. It is difficult to agree with the Illinois court that the bank has actual possession. For complete possession there must be present active dominion. *Sullivan v. Sullivan*, 66 N. Y. 37, 41; 6 HARV. L. REV. 443; see article by Albert S. Thayer, 18 HARV. L. REV. 196. The bank may be excluded from such an active dominion by the depositor, but through its own power to exclude has acquired one important element of possession, and has sufficient control to bring it fairly within the obvious purpose of the statute. Just how far such legislation is intended to cover cases where there is a power to exclude is doubtful. The owner of a large office building who rents separate rooms has a power to exclude at the street entrance, but clearly would not be within the statute. It is submitted, however, that in the principal case as well as the Illinois case there was "control" within the meaning of the legislature.

USURY — FORFEITURES — RIGHT OF DIRECTOR TO ENFORCE PENALTY AGAINST CORPORATION. — The plaintiff paid usurious interest on a loan made



to him by the defendant bank while he was on its board of directors and a member of its loan committee. He now sues the bank to recover the statutory penalty for usury. *Held*, that the plaintiff may recover whether or not he participated as director in the loan. *MacRackan v. Bank of Columbus*, 80 S. E. 184 (N. C.).

The policy of the usury statutes is such that the borrower in a usurious transaction, although a party to the wrong, is not *in pari delicto* with the lender. *Brown v. McIntosh*, 39 N. J. L. 22; *Horner v. Nitsch*, 103 Md. 498, 63 Atl. 1052. Accordingly, the borrower may ordinarily have affirmative relief on the contract, and enforce the statutory penalty for usury. *Scott v. Leary*, 34 Md. 389; *Bell v. Mulholland*, 90 Mo. App. 612; *Tayloe v. Parker*, 137 N. C. 418, 49 S. E. 921. This will be true although the debtor is a stockholder in the lending corporation. *Hollowell v. Southern Building & Loan Ass'n*, 120 N. C. 286, 26 S. E. 781. But when a director borrows from the corporation, the case is distinguishable because of the director's fiduciary duty to the corporate interests. See *Hill v. Frazier*, 22 Pa. 320, 324. It is clear that a borrower who controls the lender's action as its president or cashier will be unable to enforce the penalty. *Gund v. Ballard*, 73 Neb. 547, 103 N. W. 309; *Morris v. First National Bank of Samson*, 162 Ala. 301, 50 So. 137. A director should likewise be unable to recover, for the enforcement of such a hostile claim against the corporation would seem to be a clear breach of his fiduciary obligation. This should certainly be true in jurisdictions making a transaction between the corporation and a director, as to which he votes as director, always voidable by the corporation irrespective of its fairness. See *Munson v. Syracuse, etc. R. Co.*, 103 N. Y. 58, 8 N. E. 355. It should also follow in states upholding the transaction, unless unfair to the corporation, for a contract subjecting a corporation to a penalty at the suit of a director seems grossly unfair. See *Fort Payne Rolling Mill v. Hill*, 174 Mass. 224, 54 N. E. 532. In the principal case, however, the majority of the court insists that the language of the usury statute is too strong to admit such an exception, and this view finds much support. *Bank of Cadiz v. Slemmons*, 34 Oh. St. 142; *Buquo v. Bank of Erin*, 52 S. W. 775 (Tenn.). See NORTH CAROLINA, REVISAL OF 1905, § 1951. But it seems doubtful whether the statutes of usury should be so literally construed as to overrule the well-settled policy of the law which forbids a fiduciary to profit by the breach of his obligation.

WAREHOUSEMEN — WAREHOUSE RECEIPTS — UNAUTHORIZED SUBSTITUTION OF OTHER GOODS: RIGHTS OF PLEDGEE OF THE RECEIPTS AGAINST DEPOSITOR'S TRUSTEE IN BANKRUPTCY. — The depositor of timothy seed in a warehouse received open warehouse receipts, which he transferred to a bank as security for advances. Without authority from the bank, the depositor then substituted other seed of similar quantity and quality for that originally deposited. Later he became bankrupt, and his trustee in bankruptcy claims the substituted goods against the bank. *Held*, that the bank should prevail. *Chicago Title & Trust Co. v. National Storage Co.*, 103 N. E. 227 (Ill.).

If the holder of a warehouse receipt has assented to the substitution of other goods for those deposited, title to the substituted goods vests in him immediately. See WILLISTON, SALES, § 154; 6 AM. L. REV. 450, 467. *Cf. Bank of Newport v. Hirsch*, 59 Ark. 225, 27 S. W. 74. But when the substitution is unauthorized, the receipt holder may insist upon his original title and refuse to accept the new goods. See WILLISTON, SALES, § 442. His subsequent assent to the substitution, however, will be effective at least against the depositor and his representatives. *Brooks, Miller & Co. v. Western National Bank*, 16 Wkly. Notes Cas. (Pa.) 298; *Blydenstein v. New York Security & Trust Co.*, 67 Fed. 469. The authorities also generally agree with the principal case in sustaining the receipt holder's claim to the new goods against

the depositor's trustee in bankruptcy. See *Hoffman v. Schoyer*, 143 Ill. 598, 28 N. E. 823. The reasons assigned for this undoubtedly just result are various. Some courts find only an equitable lien, based upon estoppel. *Hoffman v. Schoyer*, *supra*. But the elements of estoppel appear to be lacking. See *Bryans v. Nix*, 4 M. & W. 775, 794. This theory, however, accounts for the dictum of the principal case that innocent purchasers of the new goods would prevail. By analogy to gifts delivered without the donee's knowledge, resort may also be had to the fiction of presumed assent, which would give the holder of the receipt actual title to the substituted goods, subject only to his own disclaimer. *Thompson v. Leach*, 2 Vent. 198, 3 Lev. 284; *Jones v. Swayze*, 42 N. J. L. 279. Upon this ground, the courts have sustained against third persons the claim of the holder of a bill of lading to goods subsequently shipped on account of the bill. *Lovell v. Newman*, 192 Fed. 753; *The Idaho*, 93 U. S. 575. See 25 HARV. L. REV. 555, 570. Cf. *Bryans v. Nix*, *supra*. Perhaps the best explanation of the result, however, is that the subsequent assent of the holder of the receipt relates back, and vests title in him from the time of the substitution. The fiction of relation, it is true, is not usually allowed to defeat intervening rights of third persons. *Bird v. Brown*, 4 Ex. 786; *Norton v. Alabama National Bank*, 102 Ala. 420, 14 So. 872. But where the transaction is so far completed that there has been an actual delivery of possession to a depositary, it seems not unjust to allow this relation back. *Grove v. Brien*, 8 How. (U. S.) 429. The creditors in the principal case have certainly not been injured by any possession in the debtor and should have no claim. And it is submitted that the dictum of the court that an innocent purchaser would prevail is unsound whether presumed assent or ratification be adopted as the ground of decision.

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## BOOK REVIEWS.

JUSTICE AND THE MODERN LAW. By Everett V. Abbot, 1913. Houghton, Mifflin and Company, pp. xiv, 299.

In the introduction (p. xiii) Mr. Abbot says: "The following pages are intended to help in the eternal conflict between established custom and justice. The first chapter is intended to exhibit the ultimate principles of justice as actually existent in the law, illustrated by cases in which they can be readily applied in the present, although they have never been so applied in the past. The second and third chapters are intended to exhibit something of the obstacles by which the progress of justice is impeded. They exhibit both the ignorance and the disingenuousness which enter into the administration of the law and which are still to be overcome. The last chapter is intended to suggest practical methods of avoiding error and detecting sophistries in the actual treatment of legal problems."

Justice is said to be (p. 3) "only the application of ethics to human affairs." The principles of ethics to be thus applied are three: the right of freedom, the duty to help, and "the reciprocating rights and duties of contract, which are, of course, solely defined by the terms of the contract itself." From this it will be seen that Mr. Abbot has not progressed much, if any, beyond the individualistic natural-right philosophy of the nineteenth century. The attempt to deduce a system of law from premises such as these has not been more successful in Mr. Abbot's case than in the cases of those who have preceded him.

Mr. Abbot's "natural right of freedom" leads him almost inevitably to the conclusion (p. 28) that inheritance taxes are unjustifiable and constitute a tak-



ing of private property for a public use without compensation, and "both the testator and the living beneficiaries of his bounty are denied the equal protection of the laws." Strangely enough, *Nunnemacher v. State*, 129 Wis. 190, is not cited.

Immediately follows the rather startling charge, that "It is not creditable to the American bar that it has . . . permitted its client's property to be seized upon the flimsy pretext that a man has no right to execute a transfer of his property to take effect at his death without the consent of the state."

Throughout, Mr. Abbot fails to see clearly the existence of social interests requiring protection. To him, apparently, the law has little or no purpose apart from the protection of the individual. His "liberty" is merely individualistic self-assertion. His "altruism" rests upon no broader foundation. For this reason, if for no other, Mr. Abbot's book fails to accomplish the purpose so eloquently set out in the introduction.

Mr. Abbot's criticisms of existing practice and administration, in chapters 2 and 3, are vigorously, perhaps too vigorously, stated; but with much of it there will be agreement. His remedy for most of our juristic evils is distressingly simple. He says (p. 283), "There is no obstacle to the attainment of a system" (apparently an ideal system) "of justice save our reluctance to take pains to think correctly." Correct thinking seems to be little more than the use of "the abstract processes of reason." Our salvation, therefore, lies in logic, or, as Mr. Abbot prefers to put it, "reason." The period of the schoolmen is Mr. Abbot's Golden Age; the syllogism his philosopher's stone by which the base juristic metal of to-day is to be transmitted into the fine gold of perfect achievement.

E. R. J.

THE SUPREME COURT AND ITS APPELLATE POWER UNDER THE CONSTITUTION. By Edwin Countryman. Albany: Matthew Bender & Company. 1913. pp. xxi, 282.

"There are," the preface says, "a few important decisions of the court of last resort, in which it has declined to exercise its appellate jurisdiction; and as this special interpretation of the judicial power is equivalent to a refusal of the court in many cases to act as a check upon the official action of the executive and Congress, this work is principally composed of a series of strictures upon those particular decisions."

Yet the author wholly fails to gratify the interest naturally excited by such an announcement.

The arrangement of the book is so obscure that to follow the line of thought is impracticable.

For example, the first chapter deals with matter not very pertinent to the subject, and goes backward and forward through history in a fashion very perplexing, the subdivisions being entitled: "Origin and Organization"; "The Last Reorganization, a Coercive Measure to Secure Judicial Approval of Legal Tender Provisions"; "Similar Legislation to Prevent Exercise of Jurisdiction by the Court"; "Equally Indecorous and Unwarranted Treatment of the Court by the Executive in Refusing to Execute its Final Judgment Overruling the Decision of a State Tribunal in 1832"; "The Legislation of 1801, Repealed in 1802, a Partisan and Reprehensible Effort to Create Additional Judges and Courts before they were Needed"; "Senatorial Condemnation of President Jackson in 1834 a Violent and Unjustifiable Proceeding"; "The Dred Scott Case, an Example of Judicial Subservience to Political Influence"; "Partisanship Predominant Influence with Senators"; "Senatorial Partisanship on Trial of Impeachment of President Johnson"; "Relentless Partisanship of Electoral Commission"; "the Judiciary Proper Subjects of Criticism"; "Partisan Motives the Prevailing Rule in the Appointment of Judges"; "Many Able and Several Pre-eminent

Judges in the Court"; "Essential Conditions of Judicial Independence"; "Existing Defects in Organization of the Court, and Amendment Suggested to the Constitution."

It is on page 78, or possibly on page 64, that the real topic of the volume seems to be begun; but the discussion is throughout so perplexingly arranged as to prevent the book from becoming whole, and, indeed, there seems to be no pretense that the book leads to a conclusion. Thus its value must consist in the discussion of separate points. There are about twenty cases which, in accordance with the announcement in the preface, are criticized by the author (p. 269); and, though the discussion appears everywhere to lack clearness, it is not at all impossible that a person interested in some of these cases may find suggestions of value.

It only remains to say that the author's attitude seems to be that of a conservative, but that his views of judicial history sometimes do not accord with the common understanding of facts and that they are never enforced by references to new sources of information.

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A TREATISE ON THE MODERN LAW OF EVIDENCE. By Charles Frederick Chamberlayne. Volumes 3 and 4. Albany: Matthew Bender & Company; London: Sweet & Maxwell. 1912, 1913. pp. xxxiii, xxxv, 4396.

These two large volumes, the second published nearly six months after the author's much-regretted death, continue a work of which the earlier installments have already been noticed in this REVIEW. Mr. Chamberlayne cannot be blamed for the publishers' statement that the four volumes cover "every phase of the subject"; but it is a surprising assertion to make of a treatise in which one looks in vain for such topics as "Witnesses," "Documentary Evidence," and "Evidence by Perception," all of which the author's footnotes in earlier volumes show he had in mind for later treatment.

Volume 3, entitled "Reasoning by Witnesses," deals with opinion evidence and related subjects, including value, handwriting and expert testimony. Volume 4, entitled "Relevancy," treats of hearsay, character and the relevancy of transactions not in issue — these last in chapters entitled "Relevancy of Regularity," "Uniformity of Nature," and "Moral Uniformity." Both volumes have the qualities already observed in their predecessors. (See review of the earlier volumes, 25 HARV. L. REV. 483.) There is much enlightened comment, showing an acute mind and a vision and perspective bred of a lifelong study of the subject. But the result is marred by a faulty terminology, and by a tantalizing diffuseness which has grievously swollen the bulk of the work. The lack of a table of cases is incomprehensible, especially in a book in which the convenience of the practitioner has been so much considered. Whether or not Mr. Chamberlayne would have permitted such an omission had he lived to see the publication of the fourth volume, he is the victim, not the author, of the graver offense of interpolating in the text, with no indication that it did not come from his hand, matter which cannot have been written in his lifetime. The seriousness of this is not lessened by fact that the book contains no reference whatever to his death.

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SELECTED CASES ON THE LAW OF CONTRACTS. By Ernest W. Huffcut and Edwin H. Woodruff. Third Edition. Albany: Banks & Company. 1913. pp. xx, 774.

The third edition of this well-known collection of cases differs materially from the preceding editions. The work was originally intended to be used in



connection with a textbook, but is now designed primarily to be used alone as the basis of instruction. Two chapters which appeared in former editions, — "Capacity of Parties," and "Impairing the Obligation of Contracts," are omitted because they relate to topics ordinarily treated in law schools in courses on Persons, and Constitutional Law. All the changes in the present edition seem improvements over the second edition, and the omissions and compressions make the book more than a hundred pages shorter than the previous edition, although the matter contained in it is greater. We are still of the opinion that the original plan of the book was seriously defective in excluding English cases, and we have regretted the popularity of Sir William Anson's arrangement of topics in the Law of Contracts, which is that adopted, since the inclusion of the personal defenses of mistake, misrepresentation, fraud and duress, under the heading of "Reality of Consent," in connection with the formation of contracts, is likely to lead to misapprehension of the nature of these defenses. Nor do we think the best grasp of illegal contracts can be obtained by considering the topic under the headings of "Legality of Consideration" and "Legality of Object," and regarding both these as necessary elements for the formation of a contract. A contract may exist and be enforceable by one party which is both illegal in its object and its consideration. These matters, however, are not appropriate for criticism of the present edition, but rather of the original treatise. S. W.

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CONSULAR TREATY RIGHTS AND COMMENTS ON THE "MOST FAVORED NATION" CLAUSE. By Ernest Ludwig. Akron: The New Werner Company. 1913. pp. 239.

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This book deals with questions which arise when an alien dies in the United States, and a consul claims the right to have a voice in administering upon the estate. The questions depend upon the construction of many treaties; for the treaties are far from uniform and many of them give privileges described as those "of the most favored nation," thus causing the investigator to search among all treaties in existence. As to the administration of estates, treaties giving consuls wide powers are those with Argentine, Paraguay, and Sweden; but the provisions of these treaties and of others are somewhat vague and conflicting, and hence require careful examination. This book gives the text of the pertinent passages of the treaties, then gives abstracts of the decisions of State courts, — including apparently some probate cases not reported elsewhere, — then discusses *Rocca v. Thompson*, 223 U. S. 317 (1912), then gives a form for a consul's application for the issuing of letters of administration, then comments on the "most favored nation" clause, and then concludes with a discussion of the nature and extent of the treaty making power. The book has neither a table of contents nor a table of cases, and thus it is not very easy to handle. Besides, it carries with it the burden of being apparently the outgrowth of something like a brief in favor of rights claimed in behalf of Austria-Hungary under the "most favored nation" clause. Yet it is a careful piece of work, and it breaks usefully the ground of an important field too slightly cultivated heretofore.

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THE ANCIENT ROMAN EMPIRE AND THE BRITISH EMPIRE IN INDIA. THE DIFFUSION OF ROMAN AND ENGLISH LAW THROUGHOUT THE WORLD. By James Bryce. New York: Oxford University Press. 1914. pp. 138.

JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES. By Charles W. Bunn. St. Paul: West Publishing Company. 1914. pp. vi, 129.

- HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS. By Roger W. Cooley. St. Paul: West Publishing Company. 1914. pp. xii, 711.
- PRINCIPLES OF CORPORATION LAW. By Joseph C. France. Second Edition. Baltimore: M. Curlander. 1914. pp. xxii, 463.
- WHERE AND WHY PUBLIC OWNERSHIP HAS FAILED. By Yves Guyot. Translated from the French by H. F. Baker. New York: The Macmillan Company. 1914. pp. ix, 459.
- HANDBOOK OF JURISDICTION AND PROCEDURE IN UNITED STATES COURTS. By Robert M. Hughes. Second Edition. St. Paul: West Publishing Company. 1913. pp. xvi, 766.
- LAW AS A MEANS TO AN END. Volume V. Modern Legal Philosophy Series. By Rudolf von Ihering. Translated by Isaac Husik. Boston: The Boston Book Company. 1913. pp. lix, 483.
- UNPOPULAR GOVERNMENT IN THE UNITED STATES. By Albert M. Kales. Chicago: The University of Chicago Press. 1914. pp. viii, 263.
- AMERICAN STATE TRIALS. Volume I. Edited by John D. Lawson. St. Louis: F. H. Thomas Law Book Co. 1914. pp. xxvi, 857.
- AMERICAN LAW RELATING TO MINES AND MINERAL LANDS. Volumes I, II, III. By Curtis H. Lindley. Third Edition. San Francisco: Bancroft-Whitney Company. 1914. pp. cclii, 2813.
- LANDMARKS OF A LAWYER'S LIFETIME. By Theron G. Strong. New York: Dodd, Mead and Company. 1914. p. 552.
- THE LIFE AND CORRESPONDENCE OF PHILIP YORKE, EARL OF HARDWICKE, LORD HIGH CHANCELLOR OF GREAT BRITAIN. Volumes I, II, III. By Philip C. Yorke. Chicago: The University of Chicago Press. 1913. pp. xv, 685; vii, 598; vii, 653.

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LISTS OF SUBJECTS OF AMES COMPETITION BRIEFS CONTAINED IN THE HARVARD LAW SCHOOL LIBRARY.<sup>1</sup>

- BILLS AND NOTES. — Checks — Forged Indorsement of Payee's Signature before Negotiation to Payee by Agent of Maker — Loss as between Bank and Maker.
- BILLS AND NOTES. — Overdue Paper: Equities of Payee — Payee-Indorser against Purchaser for Value without Actual Notice after Maturity.
- EQUITY. — Conflict of Laws — Jurisdiction to decree Affirmative Acts Abroad: Abatement of Foreign Nuisance.
- EQUITY. — Equitable Conversion — Taxation — When Subject to.
- EQUITY. — Specific Performance of Contract for Sale of Land — Statute of Frauds — Present Consideration and Personal Service as Part Performance.
- EVIDENCE. — Character of Parties — Criminal Prosecution — Murder: Vicious Character of Deceased on Issue of Self-defense.
- EVIDENCE. — Hearsay — Declarations concerning Pedigree — Requisite Connection with Family.

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<sup>1</sup> See this issue of the Review at page 570.



EVIDENCE. — Testimony at Former Trial — Criminal Trial — Former Testimony offered by Prosecution — Conditions of Admissibility — Intervening Privilege.

PUBLIC SERVICE COMPANIES. — Innkeepers — Duties to Travelers and Guests: Liabilities for Torts of Servants: Test of.

PUBLIC SERVICE COMPANIES. — 1. Rights and Duties — Discrimination in Service — Regulation Infrequently Enforced. 2. Excuses for Not Serving — Failure to pay for Past Service.

PUBLIC SERVICE COMPANIES. — Telephone and Telegraph Companies — Contracts and Stipulations limiting Liability — Unrepeated Message: Error caused by Defective Instruments.

REAL PROPERTY. — Adverse Possession. 1. Subject Matter and Extent — Constructive Possession — What Constitutes. 2. Continuity of — Tacking between Disseisors.

REAL PROPERTY. — Easements — Modes of Acquisition — Parol License acted upon.

REAL PROPERTY. — Easements. 1. Nature and Classes of: Light and Air. 2. Modes of Acquisition: Implied Grant.

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SALES. — Subject Matter of — Expectancies under Specific Bequest.

SALES. — 1. Time of Passing Title — Credit Sales — Cash Sales. 2. Rights and Remedies of Seller — Right of Retention for Purchase Price.

SALES. — Time of Passing Title — Inspection: Effect of.

SALES. — Time of Passage of Title — Unspecified Goods: Part of Larger Mass.

TRUSTS. — Cestui's Interest in *Res* — Transfer of: Right as between Sub-cestui and Subsequent Total Assignee where Cestui had only a Partial Interest in Entire *Res*.

TRUSTS. — Constructive Trusts — Misconduct by Non-fiduciaries — Title acquired by Murderer held Subject to.

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## THE END OF LAW AS DEVELOPED IN JURISTIC THOUGHT.

### I. GREEK JURISTIC THOUGHT.<sup>1</sup>

THE preceding paper attempted only to mark the course which the development of law has actually taken in different periods of legal history with respect to the end for which law exists. We turn now to the course which juristic thinking has taken during these same periods upon the question what the course of legal development should be and what should be regarded as the end of law. In other words, from legal history, the end of law as developed in legal rules and doctrines, we turn to the philosophy of law, the end of law as developed in juristic thinking. And here we may begin with the Greeks. For if law, in a modern sense, begins with the Romans, philosophy of law begins with the Greeks. What went before them is too remote for the present purpose, what went after them was largely shaped by them. Since the Romans took their philosophical ideas from the Greeks, the Greek idea of the end of law not only governed the Roman world but in consequence in large measure governed the medieval world.

It has been seen that the primitive answer to the question as to

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NOTE.—The substance of this paper will appear in a book to be entitled "Sociological Jurisprudence."

<sup>1</sup> Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, §§ 13-16; Hildenbrand, *Geschichte und System der Rechts- und Staatsphilosophie*, §§ 1-121.



the end of law was simply that law is a device to keep the peace.<sup>2</sup> Using the term in the sense of the end of the legal system, justice was a device to keep the peace. Whatever served to avert private vengeance and prevent private war was an instrument of justice. Greek philosophy soon got beyond this conception and put in its place an idea of the legal order as a device to preserve the social *status quo*, to keep each man in his appointed groove and thus prevent friction with his fellows. Justice, accordingly, was regarded as maintenance of the social *status quo*, and philosophers were busied in planning an ideal society in which everyone was put in the right place, to be kept there thenceforth by the law. The Pythagoreans spoke of anarchy as the greatest evil, since it left the social order without security, and compared justice to medicine, holding that the legislative and judicial functions, whereby the life of the state is kept in its normal course, were the analogues of hygiene and medicine, whereby the normal course of bodily life is secured or restored.<sup>3</sup> Plato brings out this idea fully. Speaking of the ideal state, he says:

"Shall we not find that in such a city . . . a shoemaker is only a shoemaker, and not a pilot along with shoemaking; and that the husbandman is only a husbandman, and not a judge along with husbandry; and that the soldier is a soldier, and not a moneymaker besides; and all others in the same way? He admitted it. And it would appear that if a man who through wisdom were able to become everything and to imitate everything should come into our city and should wish to show us his poems, we should honor him, . . . but we should tell him that there is no such person with us in our city, nor is there any such allowed to be, and we should send him to some other city."<sup>4</sup>

In Plato's ideal state the individual is not to find his own level for himself by free competition with his fellows, but "every member of the community must be assigned to the class for which he

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<sup>2</sup> See my paper, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 198.

<sup>3</sup> Erdmann, *History of Philosophy* (Hough's transl.), I, 37. Compare also the ethical theory of Heraclitus. We are told that he held self-will was to be suppressed, and said that the citizen should fight more strenuously for the laws which achieve this than for the walls of his city. *Id.* 52. Likewise Plato considered lawlessness the greatest of evils, *Gorgias*, 470, 477, 504.

<sup>4</sup> *Republic*, III, 424.

proves himself best fitted. Thus a perfect harmony and unity will characterize both the state and every person in it."<sup>5</sup> Hence a universal genius who could not be kept to his assigned place was not to be tolerated. The Stoic doctrine of conformity to nature or conformity to universal reason came to much the same practical result.<sup>6</sup> Aristotle believed that the individual man, apart from the state, became the "most malignant and dangerous of beasts," so that he could "realize his moral destiny but in the state."<sup>7</sup> Accordingly rights, that is, interests to be protected, could exist only between those who were free and equal before the state;<sup>8</sup> justice demanded a unanimity in which there would be no violation of mutual rights, *i. e.*, in which each would keep within his appointed sphere;<sup>9</sup> and right and law took "account in the first instance of relations of inequality, in which individuals are treated in proportion to their worth, and only secondarily of relations of equality."<sup>10</sup> The well-known exhortations of St. Paul in which he calls upon every one to exert himself to do his duty in the class in which he finds himself placed, bring out this same idea.<sup>11</sup>

## 2. ROMAN JURISTIC THOUGHT.<sup>12</sup>

Roman legal genius gave practical effect to the ideal of the legal order as a preservation of the social *status quo* by conceiving it to

<sup>5</sup> Dunning, *Political Theories, Ancient and Medieval*, 28. This is but a phase of a metaphysical theory of justice. In the Republic we are told that justice consists in every part of the soul fulfilling its own proper function and not taking up the function of another. Republic, 433 a, 443 c, d, e.

<sup>6</sup> Dunning, *Political Theories, Ancient and Medieval*, 105. The Stoic καθήκον, which might well be rendered duty, consists in denying the individual natural impulse. In ethical theory, this might lead to the view of Epictetus that one should not be a citizen. In political and juristic theory it led to repression of individual self-assertion. See Erdmann, *History of Philosophy* (Hough's transl.), I, 190-191.

<sup>7</sup> Politics, I, 1, 9. See Erdmann, *History of Philosophy* (Hough's transl.), I, 105.

<sup>8</sup> Politics, I, 13; I, 3-7; III, 1; III, 4-5; IV, 11. See Zeller, *Aristotle and the Earlier Peripatetics* (transl. by Costelloe and Muirhead), II, 175.

<sup>9</sup> Nicomachean Ethics, VIII, 7, 2-4. See especially § 3: "For equality in proportion to merit holds the first place in justice."

<sup>10</sup> Zeller, *Op. cit.*, II, 197.

<sup>11</sup> Eph. 5: 22 ff. and 6: 1-5.

<sup>12</sup> Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, §§ 17-20; Hildenbrand, *Geschichte und System der Rechts- und Staatsphilosophie*, §§ 131-135, 143-147; Voigt, *Das Jus naturale æquum et bonum et jus gentium der Römer*, I, §§ 16, 35-41, 44-64, 89-96; Willoughby, *Political Theories of the Ancient World*, chaps. 14-19; Gumpłowicz, *Geschichte der Staatstheorien*, §§ 40-43.



be the province of the state to delimit and secure the interests and powers of action which in their aggregate make up the legal personality of the individual. The Roman ideal, says Courcelle-Seneuil, was a stationary society, corrected from time to time by a reversion to the ancient type.<sup>13</sup>

Cicero finds the basis of law and government, not in enactment but in the moral spirit that is intrinsic in nature.<sup>14</sup> But we must not confound this *lex naturæ* or *lex naturalis* with what we now think of as natural law. Its basis is the conception that everything has a natural principle to be deduced from its characteristics and ends. From this *naturalis ratio*, a natural law may be reached.<sup>15</sup> Thus natural law involves an appeal to substance from form; an appeal to rational principles against traditional forms and arbitrary rules. The natural law of the seventeenth century, appeal to the reason of the individual against authority, and the natural law of the eighteenth century, appeal to the reason of the individual against society and the state, are very different things. A cardinal principle of Cicero's theory of justice is respect for rights acquired under the social order.<sup>16</sup> This idea appears also in the classical formula handed down in the Institutes of Justinian:

"Justice is the set and constant purpose which gives to every one his own."<sup>17</sup>

In other words, the social system has defined certain things as belonging to each individual. Justice consists in rendering him these things and in not interfering with his having and using them within the defined limits.

Another well-known formula of the Institutes expresses the same idea:

"The precepts of right and law are three; to live honorably, not to injure another, to give to every one his own."<sup>18</sup>

<sup>13</sup> Courcelle-Seneuil's parallel between the Roman and the modern ideal, from which the statement in the text is taken, may be found in English in Guyot, *Principles of Social Economy* (Leppington's transl.), 2 ed., 299. See also Courcelle-Seneuil, *Préparation à l'étude du droit*, 99, 396.

<sup>14</sup> *De Republica*, II, 1; *De Legibus*, II, 4.

<sup>15</sup> Voigt, *Das Jus naturale æquum et bonum und jus gentium der Römer*, I, 273-274.

<sup>16</sup> "All justice (*æquitas*) is destroyed if one is not permitted to hold his own." *De Officiis*, II, 22, § 78.

<sup>17</sup> *Inst. I*, 1, pr.

<sup>18</sup> *Inst. I*, 1, § 3.

This formula attempts to reduce the whole end of law to three functions: (1) maintenance of decency and decorum in men's outward acts, (2) securing of the interest of personality, (3) securing of the interest of substance. Savigny's much criticized interpretation seems entirely sound. The first precept, to live honorably, that is, to preserve moral worth in one's own person, so far as external acts go, is represented in the legal system by the doctrines as to good faith in transactions, the rules as to illegality of corrupt bargains, the various doctrines which recognize *boni mores* and attach consequences to violations thereof. The second precept, not to injure another, the respecting of another's personality as such, is represented by those rules and doctrines that give practical effect to the interest of personality. The third precept, to render to every one his own, that is, to respect the acquired rights of other men, is represented in the rules and doctrines which secure the interest of substance.<sup>19</sup> And this is simply a juristic development of the Greek idea of the end of the legal order, namely, the idea that its end is to maintain harmoniously the social *status quo*. It is a further development of the primitive idea of a device to keep the peace, and contains a good part of the truth. It is significant that recent German formulas defining the *Friedensordnung*, which is brought about by law, are coming back in some measure to this idea.<sup>20</sup>

### 3. MEDIEVAL JURISTIC THOUGHT.<sup>21</sup>

Germanic law brought back for a time the primitive conception of merely keeping the peace with its concomitant ideas of buying off vengeance, of a tariff of compositions, and of regulating private war. There is nothing of consequence for the present purpose, therefore, until after the revival of the study of Roman law in Italy in the twelfth century. Moreover, when legal development begins the ruling idea is authority. Not only was Roman law taken to be authoritatively binding, so that it could only be interpreted, but in philosophy authority was held a ground of reason

<sup>19</sup> Savigny, *System des heutigen römischen Rechts*, I, 407-410.

<sup>20</sup> See my paper, *Theories of Law*, 22 *Yale L. J.*, 114, 144-146.

<sup>21</sup> Thomas Aquinas, *Summa Theologiæ*, II, 2, qu. 57-80; Berolzheimer, *System der Rechts- und Wirtschaftsphilosophie*, II, §§ 21-23; Ahrens, *Naturrecht*, I, § 12; Stahl, *Philosophie des Rechts* (5 ed.), I, 50-73; Gumpłowicz, *Geschichte der Staatstheorien*, §§ 51-52.



and church doctrine and reason were held to be one.<sup>22</sup> Later the authority of Aristotle was accepted. Hence the conception of justice developed in Greek philosophy and Roman law was received as a matter of course. In the middle ages, as in antiquity, we see the idea of a device to keep the peace succeeded by the idea of a device to maintain the social *status quo*. To Thomas Aquinas, as to Cicero, to the classical Roman jurists and to Justinian, the principle of justice is to give every one his due.<sup>23</sup>

Appeal to reason in support of authority gradually led to an appeal to reason against authority, and that led to a new conception in philosophy, in theology, in politics, and ultimately in juristic theory, as a result of which the legal order came to be regarded as something devised to secure a maximum of individual self-assertion. The beginnings of the change are in philosophy, in the attempt to sustain authority by reason, in the proposition of Erigena that the teachings of the fathers of the church, which rest on their authority, were discovered by them with the aid of reason<sup>24</sup> and in the desire of Anselm to prove the doctrines of Scripture and of the fathers through reason, as if there were no revelation, so as to convince even the unbeliever.<sup>25</sup>

But another factor was introduced by the revival of the idea of natural law and the consequent appeal to conscience against the positive law. This revival, induced by the study of the Roman law, was no doubt furthered by the acceptance of Aristotle as an authority in philosophy. And though in Alexander of Hales, in whose *Summa* it is first noticeable,<sup>26</sup> and in Thomas Aquinas, who developed it into a detailed theory,<sup>27</sup> natural law has a purely theological basis, the idea was readily turned to new uses presently by a science of law which had cast loose from theology. With this to justify him Lord Acton amended Doctor Johnson's well-known saying so as to read that not the devil but St. Thomas Aquinas was the first Whig.

<sup>22</sup> Erdmann, *History of Philosophy* (Hough's transl.) II, 209. "No feature of the Greek theory was more elaborately developed by the scholastics than that which set up unity and permanence as the prime criteria of excellence in political organization," Dunning, *Political Theories, Ancient and Medieval*, 202.

<sup>23</sup> *Summa Theologiæ*, II, 2, qu. 58, art. 1.

<sup>24</sup> *De Divisione Naturæ*, I, 69.

<sup>25</sup> *Cur Deus Homo*, preface.

<sup>26</sup> II, 2, qu. 40-53.

<sup>27</sup> *Summa Theologiæ*, I, 2, qu. 91, 93; II, 2, qu. 57-58, 60, art. 5.

Except for the theological version of natural law, the middle ages added nothing to juristic theory. The view of antiquity as to the end of the legal order was accepted. But the way was preparing through philosophy for a new conception of justice which developed in the sixteenth and seventeenth centuries.

#### 4. THE REFORMATION.<sup>28</sup>

For the jurist the significance of the Reformation is to be found in the change from the Roman idea of universal empire and hence universal law to the Germanic or, if one will, feudal idea of a territorial state with a national law. In the law, the Reformation marks a breaking over of Germanic individualism, long kept back by Roman authority. Hence, so far as jurisprudence is concerned, it is a period of clearing away in which the ground is prepared for the constructive period of the seventeenth and eighteenth centuries through the separation of philosophy, politics and jurisprudence from theology and the establishment of a science of politics. The main purpose of the Protestant jurist-theologians was to throw over the authority of the church and to set up the authority of the state. Accordingly the most significant feature of their work, for the jurist, is their insistence on a national rather than a universal law, their insistence on replacing the universal empire of Roman law and canon law by the civil law of each state. The legal system was to rest on the authority of the divinely ordained state, not on an authoritative universal law.<sup>29</sup> All this flowed naturally from the break with authority which substituted private interpretation by the individual, each for himself, for authoritative universal interpretation by the church. The exigencies of this demand for private interpretation led to a claim of independence for the state, for the family and for the natural man. The logical result in jurisprudence

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<sup>28</sup> Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, § 24; Hinrichs, *Geschichte der Rechts- und Staatsprincipien seit der Reformation*, I, 1-60; Bluntschli, *Geschichte der neueren Staatswissenschaft*, chap. 3; Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien* (2 ed.) 18-49, 142-162, 321; Gumpłowicz, *Geschichte der Staatstheorien*, §§ 60-61, 64-65, 68, 75; Dunning, *Political Theories from Luther to Montesquieu*, chaps. 1-3.

<sup>29</sup> Thus Winckler tells us that *lex* and *ius* are cause and effect, *constituens* and *constitutum*. *Principiorum iuris libri quinque*, lib. II, cap. 1.



was the opposition of the abstract man to society which developed in the juristic thinking of the eighteenth century.

But the reformers themselves did not perceive the atomistic implications of their position with respect to politics and jurisprudence. Indeed the need of opposing the state to the church led them to a political doctrine of passive obedience.<sup>30</sup> Moreover the period was one of transition from the strict law, which ignored the moral aspects of conduct, to the stage of equity or natural law, which identified law and morals. The strong ethical element in the philosophy of the jurists of the Reformation and the emphasis which the reformers put on abstaining from sinful conduct rather than on repentance therefor, coöperated with this identification of law and morals to postpone the conclusion that the individual conscience was the sole measure of obligation to obey the law. Even if the Christian needed only the spirit for a guide, the rest of the world needed the secular sword of justice, and obedience to Cæsar was expressly enjoined in Scripture.<sup>31</sup>

In its implications the doctrine of the reformers led to the juristic theory of the eighteenth century. But there was much that must first be cleared away. This clearing process begins with Melancthon, who argues that the whole of natural law may be deduced from the Ten Commandments and from right reasoning as to the nature of man.<sup>32</sup> It goes forward with Oldendorp in whom we find the beginning of the attempts at systematic philosophical statement of the bases of law which we call systems of natural law.<sup>33</sup> It makes a significant stride when Hemmingsen attempts emancipation of jurisprudence from theology, telling us that divine revelation is not necessary to a knowledge of natural law,<sup>34</sup> asserting that

<sup>30</sup> "Melancthon was no less severe than Luther toward the rebellious peasants who sought by force to escape from the condition of serfage in which they were placed by existing laws." Dunning, *Political Theories from Luther to Montesquieu*, 15. See the quotations from Luther in Figgis, *Studies of Political Thought from Gerson to Grotius*, 241.

<sup>31</sup> This is the argument in Luther's tract on secular authority, *Werke* (hrsg. v. Böhlau, Weimar), XI, 245, 252. Cf. Melancthon, *Opera* (ed. Bretschneider and Bindseil), XI, 451.

<sup>32</sup> *Opera* (ed. Bretschneider and Bindseil), XVI, 424 ff. See Hinrichs, *Geschichte der Rechts- und Staatsprincipien seit der Reformation*, I, 18-19.

<sup>33</sup> *Iuris naturalis gentium et civilis doctrinæ* (1539).

<sup>34</sup> *De lege naturæ apodictica methodus* (1562). The passage referred to is in the preface. Kaltenborn, *Die Vorläufer des Hugo Grotius*, II, 31.

the firm and necessary ground of a legal system is to be found in the nature and end of the law,<sup>35</sup> and asserting that the ideas of right and wrong may be worked out by reason from the nature of man "without the prophetic and apostolic writings."<sup>36</sup> It gains ground when Winckler seeks to carry out the juristic program outlined by Hemmingsen.<sup>37</sup> On another side it is definitely achieved when Althusius, taking up the idea of a contract between ruler and ruled, which had been a controversial weapon in the conflicts of temporal sovereigns with the church during the middle ages, uses it as the basis of political theory and founds the natural law which is to govern juristic thought for the next two centuries.<sup>38</sup>

No direct change in the idea of the end of the legal order took place in this period. Luther thought of external peace and order as the purpose for which law exists.<sup>39</sup> Melanchthon found the basis of acquired rights in the command "Thou shalt not steal," and defined liberty as the condition "in which each is permitted to keep his own and citizens are not compelled to do anything contrary to principles of right and to what is honorable."<sup>40</sup> In other words, it requires respect for acquisitions and respect for personality.

##### 5. THE SPANISH JURIST-THEOLOGIAN.<sup>41</sup>

Just as Comte, in a period of development of the physical sciences, thought of the universe as governed by the principles of mathematics and of physics, and the nineteenth-century sociologists, in the period of Darwin's influence, thought of it as governed by the principles of biology, the Catholic writers of the counter-reformation thought of it as governed by the principles of the then rising science of jurisprudence. Accordingly, in insisting upon the Roman idea of universality they did so in a new way and upon a new basis.

<sup>35</sup> *De lege naturæ apodictica methodus* (ed. 1677) C. p. 2; Kaltenborn, II, 32-33.

<sup>36</sup> *De lege naturæ*, etc., Q. p. 7; Kaltenborn, II, 43-44.

<sup>37</sup> *Principiorum juris libri quinque* (1615).

<sup>38</sup> *Politica methodice digesta atque exemplis sacris et profanis illustrata* (1603).

<sup>39</sup> *Tract von weltlicher Oberkeit*, Werke (Weimar ed.), XI, 245, 253. Cf. Melanchthon, *Opera*, XI, 435.

<sup>40</sup> See note 32, *supra*.

<sup>41</sup> Soto, *De justitia et jure* (1589); Suarez, *De legibus ac deo legislatore* (1619); Figgis, *Studies of Political Thought from Gerson to Grotius*, Lect., VI; Dunning, *Political Theories from Luther to Montesquieu*, 132-149.



The organization of the church, its system of church law and its penitential system had tended to give a legal color to both ethics and politics in the hands of clerical writers. The spread of Roman law over Europe had in fact made law universal. A Catholic jurist, therefore, was predisposed to a legal view of the world and a Romanist could vouch everyday fact for a universal view of law. But neither of these views could be maintained longer upon mere authority. Moreover the separateness of states was no less a fact than the universality of Roman law. It was necessary, therefore, to reconcile the general authority of Roman and canon law as the common law of Christendom with the independence and equality of separate states. To effect this reconciliation, the Spanish writers turned to the idea of natural law and sought to join to a theory of independent, equal states a theory of natural law from which all rules of justice of every description derive their authority and of which Roman law and canon law are but expressions within their respective fields.

To the Spanish jurist-theologians the law of each state was not an isolated phenomenon, it was a phase of a universal principle by which all things were governed. This appears particularly in the treatise of Suarez.<sup>42</sup> In this treatise on laws and on God as a legislator there is at first sight no practical distinction between natural law and positive law. Legalist ethics and ethical law go hand in hand. The actual Spanish law, doctrines of the Roman law which he thinks should be although they are not in force in Spain, practical morality and the dictates of reason and conscience combine in a universal system.<sup>43</sup> The identification of law and morals is obviously an incident of the period of infusion of morals into law which was in full vigor at the time. But the new version of universality was an original contribution of the first moment.

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<sup>42</sup> "For it appears that the reason of every one has the force of law at least to the extent of the dictates of natural law. Therefore, at least in natural law it is not a necessary condition that it be enacted by public authority." I, 8, § 1. "It is of the reason and essence of law that it prescribe what is just. The assertion is not only certain in religion but clear in natural reason." I, 9, § 2.

<sup>43</sup> Yet Suarez saw the insufficiency of reason to demonstrate to each man all the rules required for organized society and hence laid down that society might supply the deficiency by declaratory legislation and by customs not in contravention of nature. II, 19, § 9; I, 8, § 2; XII, 13. See Westlake, Chapters on the Principles of International Law, 25-28.

For one thing it made international law possible. If international law was the work of the law-of-nature school after Grotius, it had its roots in this period and the Catholic jurists of the Counter-reformation were first among its forerunners. Our chief concern, however, is with their relation to the individualist idea of legal justice which began to develop in the seventeenth century and culminated in the nineteenth century.

The foundations of a new science of law were laid by reconciling the modern and the medieval, by recognizing the political fact of national law and adjusting it to the medieval ideals of unity and the Germanic conception of law as an eternal verity. The skilful combination of modern ideas with conservatism which characterizes the work of the Jesuit jurists enabled them to effect this reconciliation. Law was eternal. Only it was not eternal because of the authority which imposed it or by which it imposed itself, but because it expressed eternal principles of justice.<sup>44</sup> The old and the new were fitted to this conception. Recognizing the facts of the political world of their time, they conceived of individual states, and thence ultimately of individual men, as equal, since states and men were able to direct themselves to conscious ends and thus their equality was a principle of justice. Holding to the idea of the unity and universality of law as a body of eternal principles, they were led to the conception of restraints by which this equality was maintained and in which it might be expressed. Two types of such restraints suggested themselves, restraints upon states and restraints upon individuals, and these types were taken to be generically one. The restraints upon states, limitations upon their activities which they might not overpass, since they were imposed by eternal principles, might fix the limits of the activities of sovereigns in their relations with each other,<sup>45</sup> giving us international law, or the limits of the activities of sovereigns in their relations with their subjects, giving us political theory.<sup>46</sup> The restraints upon individuals had the same basis in eternal principles of universal law and were of the same nature. They fixed the

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<sup>44</sup> Soto, *De justitia et jure*, I, q. 5, a. 2.

<sup>45</sup> Franciscus de Victoria, *Relectiones theologicæ* (1557), I, 375 ff. Compare I, 359 ff.

<sup>46</sup> Soto, *De justitia et jure*, III, q. 3, a. 2; Suarez, III, 35, § 8; III, 9, § 4; III, 11. The argument for separation of powers in the passage last cited is noteworthy.



limits of individual activity in the relations of individuals with each other, giving us juristic theory.<sup>47</sup> Accordingly in the next two centuries these three subjects are always taken up together. The treatises on the law of nature and nations characteristic of the seventeenth and eighteenth centuries, are treatises on international law, on politics and on philosophical jurisprudence. The three were not separated until the nineteenth century.

Comparing the juristic theory so developed with the juristic theory of antiquity, it will be perceived that the conception of the end of law has undergone a fundamental change. The theory of antiquity thought of the legal order as a limiting of the activities of men in order to keep each in his appointed place and to preserve the social order as it stands. The theory which begins with the Spanish jurist-theologians thinks, instead, of a limiting of men's activities in the interest of other men's activities because all men have freedom of will and ability to direct themselves to conscious ends and so are equal. Thus, instead of a device to maintain a social *status quo*, the legal order begins to be thought of as a device to maintain a natural equality.

## 6. THE SEVENTEENTH CENTURY.<sup>48</sup>

It is usual to fix the date of the new era in jurisprudence by the appearance of the great work of Grotius in 1625. As he expounded the new doctrine, it had two sides. On the one hand there was a theory of limitations upon human activities imposed by reason in view of human nature, on the other hand there was a theory of moral qualities inherent in human beings, or natural rights, demonstrated by reason as deductions from human nature. The first had been propounded already by his forerunners. But whereas in Suarez the divine law-maker has established the eternal and universal principles, Grotius makes reason the measure of all obliga-

<sup>47</sup> Suarez, II, 12.

<sup>48</sup> Grotius, *De jure belli et pacis* (1625), I, 1, 3-6, 8-11; Pufendorf, *De jure naturæ et gentium* (1672), I, 7, §§ 6-17; Hobbes, *Leviathan*, chap. 15; Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, §§ 25-27; Stintzing, *Geschichte der deutschen Rechtswissenschaft*, II, 1-111; Hinrichs, *Geschichte der Rechts und Staatsprincipien seit der Reformation*, I, 60-274; II, III, 1-318; Dunning, *Political Theories from Luther to Montesquieu*, 164-171, 318-325; Duff, *Spinoza's Political and Ethical Philosophy*, chap. 22.

tion and the basis of all limitations. In part this follows from the definite breaking with theology in which he carried out the ideas of the Protestant jurists of the Reformation. In part it is an echo of the Renaissance.<sup>49</sup> In part also it is a phase of the infusion of morals into law in the stage of equity and natural law. Seventeenth-century jurisprudence followed him and in the eighteenth century Blackstone made these ideas familiar in England and America, with important consequences for our juristic and political thinking. For at the very time that the common law, under the leadership of Coke, had established its doctrine of the supremacy of law and had turned the feudal duties of the paramount lord toward his tenants into the legal duties of the king toward his subjects, a juristic theory of fundamental limitations upon the activities of states, of rulers and of individuals, dictated by external reason, had sprung up independently to furnish the scientific explanation.

As has been said, Grotius and his followers made reason the basis of all obligation. They laid it down that the end for which law exists is to produce conformity to the nature of rational creatures.<sup>50</sup> But Grotius did not think this out with much precision. He had broken with authority as authority, but he accepted the Roman law as embodied reason, and beyond a few bold assertions, such as his famous one that he could conceive of natural law even if there were no God, he ventured little that did not have authority behind it. Hence he and his followers accepted the Roman maxim — not to injure another and to give to every one his due, that is, respect for personality and respect for acquired rights — as a formula of conformity to the nature of rational creatures. This raised certain obvious problems: What is injury to another? What is there in personality that makes aggression an injury? What is it that constitutes anything one's own? Grotius and his successors tried to answer these questions by a theory of natural rights, not merely natural law, as theretofore; not merely principles of eternal validity, but certain qualities inherent in persons and dem-

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<sup>49</sup> "The boundless intellectual confidence of that springtime led them ["the men of the Renaissance"] to regard the dictates of natural law as capable of clear and exhaustive enumeration." Westlake, *Chapters on the Principles of International Law*, 28.

<sup>50</sup> "That is unjust which is contrary to the nature of rational creatures." I, 1, 3, § 1.



onstrated by reason, recognized by natural law, to which, therefore, the national law ought to give effect. Thus, again, at the very time that the victory of the courts in the contest between the common-law courts and the Stuart kings had established that there were fundamental common-law rights of Englishmen which Englishmen might maintain in court and in which courts would secure them even against the king, a juristic theory of fundamental natural rights, independent of and running back of all states, which states might secure and ought to secure but could not alter or abridge, had sprung up independently and was at hand to furnish a scientific explanation when the next century called for one. By a natural transition, the common-law limitations upon royal authority became natural limitations upon all authority and the common-law rights of Englishmen became the natural rights of man.

According to the Grotian definition, a right is "that quality in a person which makes it just or right for him either to possess certain things or to do certain actions."<sup>51</sup> In other words, the medieval idea was that law exists to maintain those powers of control over things and those powers of action which the social system has awarded or attributed to each man. The Grotian idea was that law exists to maintain and give effect to certain inherent moral qualities in every man, discovered for us by reason, by virtue of which he ought to have certain powers of control over things or certain powers of action. Thus, under the influence of the theory of natural law, we get the theory of natural rights. A right is an institution of law. But according to the theory of natural law, what ought to be law is regarded as law for that self-sufficient reason. No rule can stand as law except as it ought to be, and conversely to show that it ought to be law is to show that it is law. Hence what ought to be a right becomes identical with what is a right.

There was a good side to all this. The insistence on what ought to be as the measure of what is, liberalized and modernized the actual law of the European states through the juristic testing of every doctrine and every category with reference to its basis in reason. But it had a bad side. It led to a confusion between the interests which it is conceived the law ought to recognize and the

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<sup>51</sup> Rutherford, *Institutes of Natural Law*, I, 2, § 3.

rights by which the law secures interests when recognized, which has been the bane of jurisprudence ever since, and it led to absolute notions of an ideal development of received legal ideas as the jural order of nature which have brought legal thought and popular political thought into an obstinate conflict.

Since Jhering's treatment of the subject we have perceived that "natural rights" means only interests which we hold ought to be secured. It is perfectly true that neither the law nor the state creates these interests. But it is destructive of sound thinking to treat them as legal conceptions. Rights in the legal sense are among the devices of the law to secure these interests. Legal rights are the creatures of law, although the interests secured or which ought to be secured by legal rights are independent of law and of state. Hence we did not get much further, immediately, when in the seventeenth century justice came to be regarded as a securing of natural rights. What were natural rights was determined chiefly by ideas drawn from the existing social order and presently the natural rights of men became as tyrannous as the divine rights of states and rulers.<sup>52</sup>

Although the theory of natural rights led ultimately to a hard and fast scheme of individual interests, beyond the reach of the state, which the state was bound to secure by law, it had important consequences in broadening the conception of justice and inducing more liberal views as to the end of the law. It soon became apparent that the theory of inherent moral qualities, while it would serve for interests of personality — for claims to be secured in one's body and life and the interests immediately related thereto — would not serve for the *suum cuique* element of justice, or, as we put it to-day, for interests of substance. None of the jurists of that time questioned the existing social order. On the contrary they assumed a right of property as beyond question.<sup>53</sup> They conceived that security of acquisitions, including what one had acquired through the existing social order, was a chief end.<sup>54</sup> At the same time they could not but see a difference between this natural right and such natural rights as those to the integrity of one's body, to free motion and locomotion and to free speech.

<sup>52</sup> Moore, *Pragmatism and Its Critics*, 71.

<sup>53</sup> Pufendorf, *De jure naturæ et gentium*, IV, 4.

<sup>54</sup> Grotius, II, 1, 1; II, 1, 11; II, 10, 1; II, 17, 2, § 1.



Accordingly jurists turned for an explanation to the idea of contract, already given currency in political thought during the medieval contests between the church and temporal rulers.<sup>55</sup>

It must be remembered that contract in this connection has reference to the civil-law conception of a legal transaction (*negotium*, *Rechtsgeschäft*), an act intended to have legal consequences to which the law attributes the intended legal result. In the seventeenth and eighteenth centuries this was the staple legal analogy. The idea of the legal transaction was one of the most important of Roman contributions to law, and in an age when trade and commerce were expanding the law of such transactions was becoming the living part of the law. The juristic problem of the time was to reconcile the needs of business and the ethical ideas of good faith which accompanied the infusion of morals into the law with the traditional categories of contract in Roman law. Naturally contract loomed large in juristic thought for two centuries. Moreover the central point in the theory of the legal transaction is will, the will to produce a possible and legally permissible result. But the central idea in the theory of natural law and of natural rights was conformity to the nature of reasoning creatures possessed of wills. So the question, how could such creatures acquire rights against one another, seemed easy to answer. How, indeed, could this be except by contract, through a legal transaction? Thus the foundation of the natural rights of substance which the law existed to maintain was taken to be a legal transaction, a compact of all men with all men, by virtue of which rights and corresponding duties were created. Justice, therefore, consisted in respecting and observing the terms of this compact, and the business of jurist and law-maker was to discover and to interpret its terms.<sup>56</sup> The end of the law was taken to be a giving

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<sup>55</sup> See Figgis, *Studies of Political Thought from Gerson to Grotius*, 148-151.

<sup>56</sup> "It must be observed that the concession of God by which He gives men the use of terrestrial things is not the immediate cause of ownership . . . but it [ownership] presupposes a human act and an agreement, express or implied." Pufendorf, *De jure naturæ et gentium*, IV, 4, § 4.

"From that law of nature by which we are obliged to transfer to another such rights as being retained hinder the peace of mankind, there followeth a third, which is this, 'that men perform their covenants made'; without which covenants are in vain and but empty words, and the right of all men to all things remaining, we are still in a condition of war. And in this law of nature consisteth the fountain and original of

effect to the inherent moral qualities in individual men, whereby things are theirs, or a securing to individual men of those things to which they are entitled under the terms of the social compact.

While at first theories of natural rights and of a social contract were used to justify and to preserve the social *status quo*, they invited inquiry into the foundations of that social *status quo*. They led men to ask, how far does it express the terms of the social compact? How far does it depart from a true interpretation thereof? It is manifest that such juristic theories might become very important for political thought. But their chief importance for our present purpose is to be found in their relation to the individualism of Anglo-American legal thought. In themselves the theories are thoroughly individualist. The natural rights which are the measure of all law, are the rights of individuals who have entered into a contract. Apart from this contract, and so apart from the individual consent involved therein, there would and could be no law and nothing for the law to secure. Individualism of this sort, beginning with the Reformation and growing with the emancipation of the middle class,<sup>57</sup> obtained throughout Europe from the seventeenth century. Puritanism, with its régime of "consociation but not

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justice. For where no covenant hath preceded, there hath no right been transferred, and every man has right to everything, and consequently no action can be unjust. But when a covenant is made, then to break it is unjust; and the definition of injustice is no other than the not performance of covenant. . . . And therefore where there is no 'own,' that is, no property, there is no injustice; and where there is no coercive power erected, that is, where there is no commonwealth, there is no property, all men having right to all things; therefore where there is no commonwealth, there nothing is unjust. So that the nature of justice consists in the keeping of valid covenants; but the validity of covenants begins not but with the constitution of a civil power sufficient to compel men to keep them; and then it is also that property begins." Hobbes, *Leviathan*, chap. 15.

"Again, in the state of nature no one is by common consent master of anything, nor is there anything in nature which can be said to belong to one man rather than another. Hence in the state of nature we can conceive no wish to render to every man his own or to deprive a man of that which belongs to him; in other words there is nothing in the state of nature answering to justice and injustice. Such ideas are only possible in a social state, when it is decreed by common consent what belongs to one man and what to another." Spinoza, *Ethics*, pt. IV, pr. 37, n. § 2 (Elwes' transl.).

<sup>57</sup> "The cultural mission of the Reformation was to give life to individual freedom." Berolzheimer, *System der Rechts- und Wirtschaftsphilosophie*, II, 137. The relation of the development of individual rights and the emancipation and hegemony of the middle class is considered elaborately by Dr. Berolzheimer in his review of the maturity and downfall of the old natural law. *Id.* chap. 5.



subordination"<sup>58</sup> and its putting of individual conscience and individual judgment in the first place,<sup>59</sup> the victory of the courts in the contests between courts and crown in seventeenth-century England, which seemed to establish that the law was something that stood between the individual and organized society and secured his natural rights, political theory in the eighteenth century culminating in our bills of rights, and the philosophy of law in the nineteenth century with its different modes of demonstrating Kant's formula of justice successively developed and reënforced this tendency. Thus in England, and even more in America, there came to be an ultra-individualism in legal thought which persisted in the United States to and even beyond the end of the nineteenth century.

Putting the matter in modern phrase, according to the seventeenth century, law exists to maintain and protect individual interests.

## 7. THE EIGHTEENTH CENTURY.<sup>60</sup>

Seventeenth-century theory had taken two directions. On the one hand it conceived of rights as the outgrowth of a social contract. It held that there would be none without the social organization and that there would be no justice or law without the political organization, that is, without the state. From Hobbes and Spinoza this idea passes to Bentham, and thence in the nineteenth century to the English analytical jurists, whose theory of the nature of law is in the right line of descent therefrom. On the other hand there was the Grotian idea of rights as qualities inhering in persons. This theory put rights above the state and justice above the state as permanent, absolute realities which the state was organized to protect. It was not that there were

<sup>58</sup> See Lord Acton, *Lectures on Modern History*, 200.

<sup>59</sup> *Ibid.* 10.

<sup>60</sup> Montesquieu, *L'esprit des lois*, liv. I; Burlamaqui, *Principes du droit de la nature et des gens*, I, 1, chap. 5, § 10, and chap. 10, §§ 1-7; Wolff, *Institutiones juris naturæ et gentium*, §§ 74-102; Vattel, *Le droit des gens*, liv. I, chap. 2, §§ 15-17; Rousseau, *Contrat social*, liv. I, chap. 6; Blackstone, *Commentaries*, I, 38-43; Rutherford, *Institutes of Natural Law*, bk. II, chap. 5, §§ 1-3; Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, § 29; Korkunov, *General Theory of Law* (Hastings' transl.), § 7; Ritchie, *Natural Rights*, chap. 3; Charmont, *La renaissance du droit naturel*, 10-43.

justice and rights because there was a state. There was a state because there were rights and justice to protect and to secure. Historically, the latter theory is connected with the Germanic idea that the state is bound to govern by law; the notion of the *Rechtsstaat*, the state subject to legal limitations and legal rules of general validity independent of the state.<sup>61</sup> In the eighteenth century the second idea definitely prevailed. The social contract was not the source of rights. It was made for the better securing of preëxisting natural rights.<sup>62</sup> Both theories are thoroughly individualist.

Eighteenth-century juristic theory, down to Kant, holds to four propositions: (1) There are natural rights demonstrable by reason. These rights are eternal and absolute. They are valid for all men in all times and in all places.<sup>63</sup> (2) Natural law is a body of rules, ascertainable by reason, which perfectly secures all of these natural rights.<sup>64</sup> (3) The state exists only to secure men in these natural rights.<sup>65</sup> (4) Positive law is the means by which the state performs this function, and it is obligatory only so far as it conforms to natural law.<sup>66</sup> The appeal is to individual reason. Hence every individual is the judge of this conformity. Also on this theory natural rights alone are legal rights, for law is only a means of secur-

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<sup>61</sup> It is curious that in England, where the Germanic idea became thoroughly established in public law (except as to Parliament after 1688), the idea that all rights and all justice flowed from organized society prevailed in juristic thought, while on the Continent, where the Roman idea prevailed in public law, the Germanic idea got the upper hand in juristic theory. But the latter had apparent warrant in the Roman *ius naturale*.

<sup>62</sup> "But how great soever the change may be which government and sovereignty make in the state of nature, yet we must not imagine that the civil state properly subverts all natural society or that it destroys the essential relations which men have among themselves. . . . This would be neither physically nor morally possible; on the contrary the civil state supposes the nature of man, such as the Creator has formed it; it supposes the primitive state of union and society, with all the relations this state includes; it supposes, in fine, the natural dependence of man with respect to God and His laws. Government is so far from subverting this first order that it has been rather established with a view to give it a new degree of force and consistency. It was intended to enable us the better to discharge the duties prescribed by natural laws. . . ." Burlamaqui, I, 2, chap. 6, § 2. Cf. Vattel, liv. I, chap. 13, § 158.

<sup>63</sup> Burlamaqui, I, 1, chap. 7, § 4; Wolff, §§ 68-69.

<sup>64</sup> Burlamaqui, I, 2, chap. 4.

<sup>65</sup> Id. II, 1, chap. 3; Wolff, § 972.

<sup>66</sup> Burlamaqui, II, 3, chap. 1, § 6; Wolff, § 1069; Vattel, liv. I, chap. 13, § 159; Blackstone, I, 41.



ing them. Pushed to its logical limits, this leads straight to anarchy, and, indeed, the philosophical anarchist still proceeds upon this line.<sup>67</sup> But the eighteenth-century writers who taught that every man's conscience was the measure of the obligatory force of legal rules assumed a sort of standard conscience, a standard man's or conscientious man's conscience analogous to the prudence of the reasonable man in our law of torts. They assumed that if John Doe or Richard Roe asserted *his* conscience did not sustain the rules which the philosophical jurist deduced from the nature of a moral being, he either did not know the dictates of his own conscience or he was misrepresenting them in order to evade the binding force of the rule. It was only in this way that the social interest in general security could be protected effectively under the reign of the individualist natural law. But this meant in practice that the philosophical jurist made his personal ethical views the test of the validity of legal rules and that the lawyer took an ideal form of the settled legal principles in which he had been trained to be fundamental and eternal. The eighteenth-century philosophical method was of service in jurisprudence in that it led each jurist to work out ideal standards which could serve for a critique of the positive law. On the other hand it was a hindrance to jurisprudence in America in that it seemed to afford a scientific basis for the lawyer's faith in the finality of the common law. The common law rested on the idea that reason, not arbitrary will, should be the measure of action and of decision. The eighteenth century, however, was sure that it had the one key to reason, and was fond of laying out philosophical and political and legal charts by which men were to be guided for all time. The lawyer believed that he had this key in the traditional principles of Anglo-American law and drew his charts accordingly.

It has been pointed out in another connection that the juristic theory of natural rights was thoroughly individualist in both its aspects. As a theory of inherent moral qualities of persons it was based on deduction from the nature of the abstract, isolated individual. As a theory of rights based upon a social compact, it thought of natural rights as the rights of the individuals who had

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<sup>67</sup> Brown, *Underlying Principles of Modern Legislation*, 7 ff.; Ritchie, *Natural Rights*, 65 ff.

made the compact and had thereby set up the social and political order to secure them. In either view, the end of the law is to maintain and protect individual interests. This fitted so perfectly the legal theory of the common-law rights of Englishmen that the founders of our political and legal and judicial systems who were studying Coke and Blackstone on the one hand, and the French and Dutch publicists on the other hand,<sup>68</sup> had no doubt they were reading about the same things. Hence Americans of the end of the eighteenth century argued for either or for both. The declaration of rights of the Continental Congress in 1774 asserted the legal rights of Englishmen. The Declaration of Independence two years later asserted the natural rights of man. Yet each claimed the same things.

From this identifying of common-law rights with natural rights it followed that the common law was taken to be a system of giving effect to individual natural rights. It was taken to exist in order to secure individual interests not merely against aggression by other individuals but even more against arbitrary invasion by state or society.<sup>69</sup> It followed also that the bills of rights were declaratory of natural rights,<sup>70</sup> and were likewise declaratory of the common law.<sup>71</sup> This idea is prominent in judicial decisions in the

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<sup>68</sup> *E. g.*, Wilson's *Lectures on Law* (1804). Chapters 2 and 3 (Of the General Principles of Law and Obligation and Of the Law of Nature) are based on Blackstone, Grotius, Pufendorf, Burlamaqui, Wolff, Vattel and Rutherford's *Institutes of Natural Law* (1754-56), an English exposition of Grotius which went through two American editions early in the nineteenth century.

<sup>69</sup> *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 134 (1810); *Story on the Constitution*, § 1399; *Cooley, Constitutional Limitations*, 358-383. Cf. Wilson, *Works* (Andrews' ed.) I, 566.

<sup>70</sup> *Story on the Constitution*, § 1381; *Calder v. Bull*, 3 Dall. (U. S.) 386 (1798); *Wilkinson v. Leland*, 2 Pet. (U. S.) 627, 657 (1829); *Terrett v. Taylor*, 9 Cranch (U. S.) 43 (1815); *Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 662 (1874); *Benson v. Mayor*, 10 Barb. (N. Y.) 223, 224 (1850). "With those judges who assert the omnipotence of the legislature in all cases where the constitution has not interposed an explicit restraint, I cannot agree. Should there exist . . . a case of direct infraction of vested rights too palpable to be questioned and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact, and within the control of the judiciary." Hosmer, C. J., in *Goshen v. Stonington*, 4 Conn. 209, 225 (1822). Cf. *Regents v. Williams*, 9 Gill & Johns. (Md.) 365 (1838).

<sup>71</sup> "The usual Anglo-Saxon bill of rights, as contained in our state constitutions, is in fact nothing more or less than the written expression of a previously existent, but silent limitation upon the power of legislators which is imposed even without the writing." Abbot, *Justice and the Modern Law*, 47. "The very first and indispensable



nineteenth century, when the ideas of the eighteenth century had become classical. Thus one court, in passing on legislation directed against fines in cotton mills, told us that a statute which violates "fundamental rights [is] unconstitutional and void even though the enactment of it is not expressly forbidden."<sup>72</sup> Another court told us that natural persons did not derive their right to contract from the law; hence whatever the state might do in limiting the power of a corporation to make certain contracts, because the corporation got its power from the state, it might not limit the contractual capacity of natural persons, who got their right to contract from nature, so that nature alone could remove it.<sup>73</sup> Another court, in passing adversely upon labor legislation infringing upon liberty of contract, said that any classification was arbitrary and unconstitutional unless it proceeded on the "natural capacity of persons to contract."<sup>74</sup> Another, in a similar connection, denied that contractual capacity could be restricted except for physical or mental disabilities.<sup>75</sup> All these instances come to the proposition that the common-law categories of disability are final and that legislation cannot add new ones. The bills of rights and the Fourteenth Amendment were treated as but declaring a natural liberty which was also a common-law liberty. Hence an abridgment not known to the common law was thought to go counter to their fair construction, if not to their letter. Perhaps nothing has contributed so much to create and foster hostility to courts and law and constitutions as this conception of the courts as guardians of individual natural rights against the state and against society, of the law as a final and absolute body of doctrine declaring these individual natural rights, and of constitutions as declaratory of common-law principles, which are also natural-law principles, anterior to the state and of superior validity to enactments by the authority of the state, having for their purpose to guarantee and maintain the

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requisite in legal education . . . is the acquisition of a clear and accurate perception . . . of those unchangeable principles of the common law which underlie and permeate its whole structure, and which control all its details, its consequences, its application to human affairs." Phelps, *Methods of Legal Education*, 1 *Yale L. J.* 140. Cf. Sharswood, *Legal Ethics* (5 ed.), 31-54.

<sup>72</sup> *Comm. v. Perry*, 155 Mass. 117, 28 N. E. 1126 (1891).

<sup>73</sup> *Leep v. Railway Co.*, 58 Ark. 407, 25 S. W. 75 (1894).

<sup>74</sup> *State v. Loomis*, 115 Mo. 307, 22 S. W. 350 (1893).

<sup>75</sup> *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188, 10 S. E. 288 (1889).

natural rights of individuals against the government and all its agencies.

While we were receiving the eighteenth-century theory in America and were making it the foundation of our political and juristic structures, the theory was about to get its death-blow at the hands of Immanuel Kant. If in fact the individual conscience was made the sole test, the theory could be practically tolerable only at a time when absolute theories of morals prevailed. All men, or most men, must agree in their moral standards, or agree in looking to some ultimate authority for decisive pronouncement on the content and application of moral principles, or else legal doctrine would be wholly at large. Hence the actual situation was that the lawyer took the principles of the received legal tradition as an authoritative guide while the jurist and philosopher sought to impose their several personal views as final statements of fundamental principles. Bentham pointed this out in a famous passage. He said the various criteria proposed by jurists and moralists "consist in so many contrivances for avoiding the obligation of appealing to any external standard and of prevailing upon the reader to accept of the author's sentiment or opinion as a reason for itself."<sup>76</sup> When absolute theories began to be discarded and ultimate authorities were no longer recognized; when, moreover, classes with divergent interests came to hold diverse views upon fundamental points, natural law in the eighteenth-century sense became impossible. Accordingly in the nineteenth century the historical jurists threw over ideals entirely and the metaphysical jurists sought to deduce natural law from some fundamental conception of right or justice.

The immediate cause of this change of base is to be found in the philosophy of Kant. At the end of the eighteenth century he struck a decisive blow at the philosophical jurisprudence which had obtained for the past two centuries. If natural rights were inherent moral qualities to be ascertained by reason, granting that reason could deduce infallibly from given premises, how could reason give us the premises? If, on the other hand, natural rights rested on a social contract, how could the details or the implied terms of a contract of a past generation bind the men of to-day? The fiction of representation, the doctrine insisted upon by Blackstone

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<sup>76</sup> Principles of Morals and Legislation (new ed., 1823), 17.



that we were represented when our fathers made the contract and so are bound, was obviously founded on British political theory in which all consent to acts of Parliament through the representatives sent to Westminster to act for them. It would not bear examination. Hence Kant sought to find the basis of rights and of justice as a means of securing rights in some ultimate metaphysical principle, some ultimate datum from which rights might be deduced. He found this fundamental idea in freedom of will. He conceived that the problem of law was to reconcile conflicting free wills. He held that the principle by which this reconciliation was to be effected was equality in freedom of will, the application of a universal rule to each action which would enable the free will of the actor to co-exist along with the free will of every one else.<sup>77</sup> The whole course of nineteenth-century juristic theory was determined by this conception. Kant marks an epoch in philosophical jurisprudence no less than Grotius.

Summarily stated, to the eighteenth century, justice, the end of law, meant the securing of absolute, eternal, universal natural rights of individuals, determined with reference to the abstract individual man. Kant, on the other hand, held it to mean the securing of freedom of will to every one so far as consistent with freedom of all other wills. Thus the transition was complete from the idea of justice as a maintaining of the social *status quo* to an idea of justice as the securing of a maximum of individual self-assertion.

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[To be continued.]

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<sup>77</sup> "Every action is right which in itself, or in the maxim on which it proceeds, is such that it can co-exist along with the freedom of the will of each and all in action according to a universal law." *Metaphysische Anfangsgründe der Rechtslehre* (2 ed.), XXV. Cf. "I must in all cases recognize the free being outside of me as such, that is, must limit my liberty by the possibility of his liberty." Fichte, *Grundlage des Naturrechts*, I, 49.

## ONE YEAR UNDER THE NEW FEDERAL EQUITY RULES.

THE new federal equity rules promulgated November 4, 1912, by the United States Supreme Court, effective February 1, 1913, have been subjected to close scrutiny and many rigorous tests during the initial year's period of their existence.

Notwithstanding the fact that numerous attorneys felt that the changes made by these rules were of such a radical nature as to seriously handicap the proper trial of equity causes and in some instances to entirely defeat the ends of justice, these rules are not working any real hardships. Where consistently and fairly administered, they are securing the ends sought, *viz.*, that of securing a more speedy termination of equity litigation with the minimum of expense to the litigants.

In enacting the new rules it is fortunate indeed that the Supreme Court saw fit to follow, where practicable, the old equity rules, for the latter undoubtedly embodied the simplest, most direct, flexible and adequate judicial system that had been contrived.

The old rules gave the court wide discretion in causing cases to be brought to a speedy termination. Most of the abuses arising under the old rules grew out of the negligence or the indisposition of client or counsel in bringing the causes to an early hearing. Under the old rules, however, if the court, the litigants and their counsel were all equally anxious to bring a case to an early hearing, it could be done quite as quickly and advantageously as under the new equity rules.

Under the new rules, counsel must keep closely in touch with their pending cases, for these rules specify the time when causes shall be put upon the calendar. If not tried when called, they are dropped from the calendar, and at the end of a year thereafter, unless reinstated by the court on application duly made, are dismissed without prejudice.<sup>1</sup>

An equity case may now be generally disposed of within five months, for under the new rules a defendant is given twenty days

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<sup>1</sup> Federal Equity Rules 56 and 57.



in which to file his answer after being served with subpoena, and, unless some additional pleading is filed by complainant, the case is then at issue. The complainant has sixty days after the filing of the answer in which to take and file his depositions, and the defendant thirty days thereafter in which to take and file depositions, and twenty days thereafter is allowed both parties in which to take and file depositions in rebuttal. This gives the parties one hundred and ten days to get the case ready for trial in open court.

This change in the rules is important mainly in having cases automatically placed upon the trial calendar.

Under the new equity rules a very large number of old cases have been wiped out and the court calendars cleared of dead and long slumbering causes.

Public sentiment, and the fact that the federal judges generally are anxious to finally dispose of cases, is bringing about a radical change in the practice and has caused equity litigations to be terminated in a much shorter time during the past year than during previous years. This change is undoubtedly greatly augmented by the promulgation of the new equity rules quite as much as by any other cause, although public sentiment largely influenced the prompt disposition of cases in many instances prior to the adoption of these rules. This public sentiment was largely due to the following causes:

*First*, the proposed recall of judges and of judicial decisions.

*Second*, the constant and aggressive advocacy by ex-President Taft of the necessity for reforms along this line.

*Third*, the complaint on the behalf of litigants themselves due to the expense of protracted litigations and to the fact that their rights were in many instances entirely cut off because the decisions were so long delayed.

*Fourth*, that court and counsel who were desirous of disposing of litigations felt that rules of a more mandatory character would be exceedingly beneficial in securing shorter and more speedy trials.

Judges who are willing to hear and decide their cases promptly (and it is fortunate that so large a per cent of the eminent jurists who now constitute and grace our federal bench are doing this) are securing excellent, quick and decisive results for litigants under the new rules. The few courts who persist in withholding their opinions for a year or more after the final hearing are not pre-

vented from so doing by the new rules, and are reaping their own reward in the severe criticism that is being heaped upon them in Congress, by other judges, by lawyers generally and by the public at large.

The action of a few of our federal judges in failing to promptly decide cases after they have been submitted on final hearing is in some instances entirely destroying the rights of litigants who are so unfortunate as to have been compelled to try their cases before them. The new rules are entirely inadequate to prevent such delays, for, once the cause is submitted to the chancellor, there is nothing in them compelling prompt action on his part.

It is fortunate indeed for all concerned, and for the reputation of our federal judiciary, that instances of judicial procrastination in rendering decisions are extremely rare, and that such United States District Court judges are very few in number. Such men work a great injustice to the public at large and to the large majority of their conscientious and energetic contemporaries. The federal courts generally are administering the new rules in accordance with the aims of those who caused them to be adopted.

The courts of appeals without exception are uniformly promptly disposing of the cases coming before them, and are in full accord with the intent and spirit of the new rules. It is extremely gratifying to the litigants and the bar generally, that decisions are so promptly handed down after being submitted to the appellate courts.

The advance criticism of eminent lawyers that the present number of judges would be inadequate to try equity causes in open court has proven true, for, in the busier districts, calendars are congested, and this must necessarily be so until more judges are provided. In spite of the arduous work that is being done by our conscientious federal judges in the busy districts, and the vast amount of time which they are expending, oftentimes with great detriment to their health, it is impossible for them to keep up with their calendars.

The provision which enables judges from any part of the country to be assigned to different districts, and the assistance rendered by the circuit judges from the abolished Court of Commerce, has helped materially, but has not relieved the situation entirely.



Any radical change in court procedure necessarily involves a great deal of expense to litigants during the early stages of the administration of the new rules of procedure. It also requires a great deal of time of court and counsel in applying these rules to the various causes which come before them, but I think it can be fairly said that the new federal equity rules have caused as little inconvenience to the public, to the bar and to the judges as any rules that could be adopted involving so great a change in practice.

Where it is possible to do so, the courts are evidently being guided in their interpretation of the new rules by the numerous decisions under the old rules, and it is well that they are doing so, for the old rules had been passed upon during a period of a great many years by many able jurists.

Many of the decisions and orders made under the new rules have not been reported, as they are entered after preliminary hearings; nevertheless these have a very important bearing on litigations in the various courts where the causes are pending. Some of the more important of these rulings will be referred to in the attempt to point out what is happening in the administration of equity practice under these rules.

The rules<sup>2</sup> requiring an answer in an equity cause to be filed within twenty days after the subpoena is served, would, in many instances, work a serious handicap to the defendant should the court be so illiberal as not to extend the necessary time to permit the securing of counsel and gathering legitimate defenses together. For instance, the party contemplating a suit may, without any notice to the defendant, fully prepare himself for trial prior to the filing of the bill; he may have taken many months in getting his information together; the suit may then be filed and the defendant may be served and compelled to make extensive investigations before he is prepared to file his answer. This is particularly true of defendants in patent suits where the defensive material may be scattered throughout the country and in remote parts, in the guise of prior patents, publications or prior public uses.

In the large majority of instances, the courts have appreciated this difficulty and have given to the defendant, on proper showing, sufficient additional time in which to prepare for and file his

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<sup>2</sup> Federal Equity Rules 12 and 16.

answer. Attorneys have also adopted the practice in numerous causes of stipulating an extension of time, and, prior to the expiration of the twenty days during which the answer must be filed under the rules, secured the approval of the stipulation by the court before whom the case is pending, and have accomplished satisfactory results thereby.

In one case,<sup>3</sup> however, which has been called to the writer's attention, the defendants failed to answer within the time specified by the rules,<sup>4</sup> and immediately thereafter filed a petition setting up the following facts: that the summons was served on one of defendants' officers when he was on his way to the train for the purpose of meeting an important business engagement in the west; that he gave the summons to his son to be given to his attorneys; that by an oversight no appearance was entered nor answer filed. A petition was filed by the defendants asking leave under the circumstances to answer. This petition was denied.

The equity rules do not contemplate the deprivation of defendant of his rights to be heard under such circumstances as these, as has been recognized by most of the courts before whom this question has come under this rule. Had the judges generally been illiberal in granting an extension of time in which to answer, great hardships would often have been incurred, for in many cases the securing of proper counsel to make a defense, in an intricate cause, has necessitated the spending of several days' time, to say nothing of the large amount of time that has been necessary to develop proper defenses after securing counsel. If the courts are liberal in granting extensions in the proper cases, such a rule is not a harsh one, and in some instances no hardship would be worked by requiring the defendant to answer in so short a period of time, particularly if he had notice sufficiently in advance of the filing of the bill. If the defendant is to be cut off entirely from his rights to be heard on account of his inability or failure to file a proper answer within twenty days, as in the instance above referred to, much better results would be universally secured by giving the defendant more time in which to file his answer. This would also save the necessity of applying to the court for an extension of time

<sup>3</sup> *N. S. Snyder et al. v. Brast Hotel Co. et al.*, brought in the Federal Court at Phillippi, West Virginia.

<sup>4</sup> Federal Equity Rule 12.



in such a large number of cases as has been necessary since the rule was enacted.

The rule<sup>5</sup> permitting amendments on proper showing to pleadings, however, lessens the rigor of rules 12 and 16 considerably, and such amendments are being frequently filed.

Another new rule of considerable importance, and intended to prevent the dismissal of causes brought on the equity side of the court when they should have been started on the law side, or *vice versa*,<sup>6</sup> is to some extent saving time and expense in litigations. In a suit brought in Utah,<sup>7</sup> the defendant filed a motion to dismiss the bill of complaint on the ground that the plaintiff was not entitled to maintain a suit in equity because it had an adequate remedy at law by ejectment. Under the old rules the equity cause would have been dismissed, but under the new rules the court, in overruling the motion there brought, holds that the equity suit should not be dismissed, and that "the objection, if well taken, is only ground for the transfer of the suit to the law side of the court and does not justify a dismissal."

This ruling seems to be entirely in accord with the spirit of the new rules, and accomplishes the results intended by them, and saves litigants considerable time and expense.

The new rule, intended to simplify and abbreviate pleadings,<sup>8</sup> was universally approved by the prominent attorneys who were selected to make suggestions to the Supreme Court as to the needed changes in the equity rules. This rule is cutting down the length of bills of complaint very materially, and in a number of instances very short forms of bills distinctly stating the cause of action have been held sufficient.<sup>9</sup> An illustration of this is, that under the old practice it was necessary in patent causes to plead substantially the language of sections 4883, 4886 and 4887 of the Revised Statutes, and a bill was demurrable which did not specifically plead the substance of these statutes. Under the ruling of Judge Tuttle of the Eastern District of Michigan, in the Carburetor Company case cited, it is unnecessary to plead these statutes

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<sup>5</sup> Federal Equity Rule 19.

<sup>6</sup> Federal Equity Rules 22 and 23.

<sup>7</sup> *United States v. Utah Power & Light Co.*, 208 Fed. 821 (1913).

<sup>8</sup> Federal Equity Rule 25.

<sup>9</sup> *Zenith Carburetor Co. v. Stromberg Motor Devices Co.*, 205 Fed. 158 (1913).

at the present time, and it appears that the language of his opinion is in accordance with the intention of the Supreme Court in promulgating this rule, and the attorneys who drew it well deserve the commendation of the learned judge, who says:

"It strikes me that counsel for complainant, in adopting the language found in the opening paragraph of his bill, has conformed in a most gratifying degree to the language and intent of the new equity rules by simplifying and abbreviating his bill."

The bill which this judge had before him is set out in a leading authority on Federal Practice as a model for the modern bill of complaint in equity in a patent cause,<sup>10</sup> although the author is compelled to say of it, that

"Whether such a form would be approved by another court cannot be foretold."

and in doing so refers to a decision of another court,<sup>11</sup> which holds in effect that this new equity rule<sup>12</sup> does not abrogate the established rule in cases involving the infringement of patents requiring the bill to plead the allegations of the statutes under which patents are granted, and all the facts necessary to show that the patentee was entitled to the patent and to negative the existence of those facts which would defeat it.

It is impossible to entirely reconcile the decisions in other cases, reported<sup>13</sup> and unreported, with the cases cited in connection with this rule, but the majority of such opinions as I have been able to get in touch with hold that the simple form of bill, approved by Judge Tuttle in the Carburetor Company case, is adequate and to be commended.

The question of the sufficiency of the bill, in the various cases to which attention has been called, has been raised by motion to dismiss,<sup>14</sup> which, under the decisions of various of the courts, comprehends within its broad scope the technical pleadings under the old rules known as demurrers, pleas, exceptions and the like.

This motion has been successfully used in raising the question

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<sup>10</sup> Foster's Federal Practice, 5 ed., Vol. 3, p. 2581.

<sup>11</sup> Maxwell Steel Vault Co. v. National Casket Co., 205 Fed. 515 (1913).

<sup>12</sup> Federal Equity Rule 25.

<sup>13</sup> Wilson v. American Ice Co. *et al.*, 206 Fed. 736 (1913).

<sup>14</sup> Federal Equity Rule 29.



of the sufficiency of the bill, and a motion to strike out<sup>15</sup> in challenging matter not properly pleadable in an answer, and also to secure a ruling upon a single affirmative issue not set up in the bill which might have been raised by plea under the old rules. It has probably been under consideration by the courts quite as many times as any of the new rules, because of the extent to which it has been utilized by counsel in equity causes.

While it has always been possible for the plaintiff to file interrogatories in a bill of complaint in an equity cause, and in some instances for the defendant to make use of interrogatories, the new rules specifically provide for the use of interrogatories, both by the plaintiff and the defendant, for the discovery of facts, and for the inspection and production of documents material to the support of the cause of action or defense.<sup>16</sup> Some aggressive attorneys are constantly filing such interrogatories, often with beneficial and sometimes with detrimental results.

A recent case<sup>17</sup> decided by the Court of Appeals of the Seventh Circuit is a striking illustration of the benefit to be derived by filing interrogatories and a motion to dismiss the bill, as these obviated the necessity of taking evidence. In this case the plaintiff filed his bill for the infringement of a patent on a protector or apron. The defendant filed its answer and attached thereto samples of each of the aprons it was manufacturing and selling, and by interrogatory asked the plaintiff which of the aprons referred to in the answer was an infringement of the patent sued on. In response to the interrogatory in question, the plaintiff specified certain of the aprons referred to in the answer, whereupon the defendant moved to dismiss the bill on the ground that the aprons did not infringe the patent sued on.

After hearing the arguments, the lower court sustained the motion, held no infringement and dismissed the bill. From the decree dismissing the bill an appeal was taken to the Court of Appeals, the latter affirming the lower court.

The rules<sup>18</sup> governing what may be included in the answer have been the subject of much contention among attorneys, and such courts as have passed upon them are not in harmony.

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<sup>15</sup> Federal Equity Rule 33.

<sup>16</sup> Federal Equity Rule 58.

<sup>17</sup> *Bronk v. Charles H. Scott Co.*, C. C. A. 7th Cir., Oct. Term, 1913 (not yet reported).

<sup>18</sup> Federal Equity Rules 30 and 31.

In numerous instances the defendant has attempted to plead in its answer affirmative matters entirely independent of and not in any way arising out of the cause of action set up in the bill. Some courts hold that any controversy between the parties, whether relating to the same subject-matter or not, may be litigated in the same suit. Other courts hold that any affirmative relief asked for in the answer must be germane to or arise out of the original proceeding. These latter courts are seemingly in the majority.

Most of the decisions under this Rule 30 have been in patent, trade-mark or unfair competition cases, where the plaintiff was asserting rights under his statutory grant and the defendant in his answer has either asked affirmative relief against the plaintiff for infringement of a separate and independent patent owned by him, or has attempted to sue the plaintiff in its answer for unfair competition in trade.

The situation usually arises as follows: A. brings suit against B. for the infringement of a patent. B., after answering the bill, sets up the necessary allegation for charging A. with infringement of a patent or trade-mark owned by him or for unfair competition arising out of the advertising of plaintiff's patent. The plaintiff then files a motion to dismiss or strike out the action brought by B. in his answer,<sup>19</sup> whereupon the court hears this motion and either permits the suit by defendant to go on, or dismisses it, or strikes all allegations concerning it from the answer.

One line of cases originating in the First Circuit<sup>20</sup> decided that

"The provision of Rule 30 of the new rules in equity that an answer 'may, without cross-bill, set out any counterclaim against the plaintiff which might be the subject of an independent suit in equity against him,' applies only to a counterclaim proper, arising out of the transaction which is the subject-matter of the suit."

and holds that the language of this rule that

"the answer must state in short and simple form, any counterclaim arising out of the transaction which is the subject-matter of the suit."

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<sup>19</sup> Under Federal Equity Rule 30.

<sup>20</sup> Judge Dodge, District of Massachusetts, in *Terry Steam Turbine Co. v. B. F. Sturtevant Co.*, 204 Fed. 103 (1913).



applies to the last portion of this section of the rule in exactly the same way as it does to the first portion thereof. Judge Dodge, who decided this matter in the First Circuit, very tersely states his conclusions regarding this rule when he says:

"I must therefore regard the provision, 'and may, without cross-bill, set out any set-off or counterclaim,' etc., as applying only to any such counterclaim as is described in the words immediately preceding; *i. e.*, any counterclaim arising out of the transaction which is the subject-matter of the suit. That the defendant's proposed counterclaim is not of this character is obvious. He could not have set it up by cross-bill."

It would seem that there was ample justification for this decision in the rule immediately following,<sup>21</sup> for in it the Supreme Court only permits the plaintiff ten days in which to reply to any "set-off or counterclaim" included in the answer. Inasmuch as the defendant originally has twenty days in which to file its answer, it would seem obvious that, had the Supreme Court intended to allow the defendant to bring suit in its answer on a subject-matter entirely foreign to that arising out of the original proceeding, it would have given the plaintiff the same time to "reply" as it did the defendant. There are a number of reported and unreported decisions which follow, augment and support the ruling of Judge Dodge.<sup>22</sup>

There are also some cases which do not directly decide the point, but tend to support the reasoning in the above cases and have a more or less pertinent bearing on the subject-matter.<sup>23</sup>

One of the leading cases holding that the defendant may set up in his answer "any independent cause of action" regardless of its relation to the original suit,<sup>24</sup> had to do with a counterclaim set up in an answer in a patent infringement suit, in which the plaintiff was charged with having circulated false statements about the

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<sup>21</sup> Federal Equity Rule 31.

<sup>22</sup> Judge Hazel (N. Y.) in *Williams Patent Crusher & P. Co. v. Kinsey Mfg. Co.*, 205 Fed. 375 (1913); Judge Geiger (Wis.) in *Adamson v. Shaler*, 208 Fed. 566 (1913); Judge Carpenter (Ill.) in *Kawneer Mfg. Co. v. Hester Mfg. Co.* (unreported).

<sup>23</sup> Judge Martin (Vt., sitting in Conn.) in *Salt's Textile Mfg. Co. v. Tingue Mfg. Co.*, 208 Fed. 156 (1913); Judge Rellstab (N. J.) in *Motion Picture Patents Co. v. Eclair Film Co.*, 208 Fed. 416 (1913).

<sup>24</sup> Judge Lacombe (N. Y.) in *Vacuum Cleaner Co. v. Amer. Rotary Valve Co.*, 208 Fed. 419 (1913).

defendant's device and had threatened its customers with suits which it had no intention of bringing. The learned judge, in overruling the motion to strike the so-called counterclaim, says:

"It is prayed that further interference of this sort with defendant's business be enjoined and that it have damages for any loss already sustained by the circulation of these statements and threats. This may or may not be a good cause of action; it may or may not be susceptible of proof; it can hardly be said to arise out of the transaction which is the subject-matter of the suit. But it does fall within the second category of counterclaims allowable under New Equity Rule 30, since it 'might be made the subject of an independent suit in equity against the plaintiff.'"

This case is supplemented by others, one of which<sup>25</sup> more fully states the reasons upon which the court in the Turbine Company case, above referred to, evidently based its conclusions. Other unreported orders<sup>26</sup> overruling such motions have been entered without any reasons being given for such action.

Attorneys quite generally, and some of the courts, seem to feel that, should the latter line of authorities be adhered to, litigations, and particularly those involving complicated legal and mechanical matters, would be so cumbersome as to defeat the purpose of the rules and in some instances the rights of litigants.

Perhaps the most radical of all changes in the new rules, and the one most strenuously opposed by numerous attorneys prior to its adoption, was the provision in Rule 46 that

"In all trials in equity, the testimony of witnesses shall be taken orally in open court except as otherwise provided by statute or by these rules."

the only exceptions to this rule being that for good and exceptional cause the court could permit depositions to be taken before an examiner, and that evidence could be taken under the Revised Statutes<sup>27</sup> within the time provided by the rules.<sup>28</sup>

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<sup>25</sup> Judge Chatfield (N. Y.) in *Marconi Wireless Telegraph Co. v. National Electric Signaling Co. et al.*, 206 Fed. 295 (1913).

<sup>26</sup> Judge McPherson (Iowa) in *Amer. Steel Foundry Co. v. Bittendorf Co.* (unreported).

<sup>27</sup> Revised Statutes, sections 863, 865, 866, 867.

<sup>28</sup> Federal Equity Rule 54.



The rules of some of the district courts<sup>29</sup> adopted under Rule 79, however, provided that cases should be placed upon the calendar "twenty days after the issue was joined, by the filing of the answer, unless an order was filed for the taking of depositions under the Supreme Court Rule 47, or affidavits under Supreme Court Rule 48, or that notice be given to the clerk for the taking of depositions under the Revised Statute," in either of which cases the cause shall not "be placed upon the calendar until the expiration of the time limited by the Supreme Court."<sup>30</sup>

Such supplemental District Court rules in a large majority of cases place a burden upon the parties to secure an order permitting the taking of testimony, for in a large number of cases neither the courts nor the attorneys are ready to try the case within so short a period.

There is considerable lack of uniformity among the decisions on this Rule 46, as well as the ones relating to testimony in patent and trade-mark cases,<sup>31</sup> for some of the courts are permitting the evidence in various cases to be taken before an examiner selected by the parties under an order based upon the stipulation between counsel, and other courts are insistent that all the evidence of expert witnesses, and those residing within one hundred miles of the place of trial, be taken in open court. Courts are likewise exercising a wide discretion as to the admissibility of expert testimony under Rule 46, and are excluding the evidence of experts not sufficiently qualified. There have also been various interpretations as to what constitutes "good and exceptional cause"<sup>32</sup> for departing from this general rule of requiring evidence to be taken in open court. Some of the more busy courts are interpreting this rule with great liberality and allowing the evidence to be taken by deposition if the case is to consume considerable time, while in less busy districts the judges require that all of the evidence not excepted by the rules be taken before them. Most of the orders relating to this rule are unreported, although some have appeared,<sup>33</sup> and others will undoubtedly be printed in future reports.

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<sup>29</sup> Equity Rules of the District Court of the United States, Southern Dist. N. Y., effective February 1, 1913 (Rule 1).

<sup>30</sup> Federal Equity Rules 47 and 56.

<sup>31</sup> Federal Equity Rule 48.

<sup>32</sup> Federal Equity Rule 47.

<sup>33</sup> Judge Ray (N. Y.) in *North v. Herrick*, 203 Fed. 591 (1913).

In the Southern District of New York, a rule <sup>34</sup> has been adopted, which is not generally followed elsewhere, to the effect that an assessor may be appointed by the court "upon consent of all parties" in the trial of a patent cause, "whenever, in the opinion of the court, the cause involves intricate, technical or scientific questions," who "shall sit with the judge at the hearing of the evidence and shall assist the court in its deliberations upon the cause in such a manner as the trial judge may request," and the opinion of the assessor, "at the request of the judge, shall be a portion of the record on appeal."

There are also other rules in the same and other jurisdictions interpreting the general equity rules as to what may be set up in affidavits to be filed and similar matters.

The main difficulty to the practitioner, under the new rules, is in ascertaining the practice adopted in the various districts, for the reason that but few of the orders made relative to these rules are reported, and only local counsel, who are actively and constantly in touch with the federal court procedure, can be well informed concerning the way in which a particular case has to be handled.

In most instances, there is the necessity of employing local counsel thoroughly acquainted with the federal court practice in the particular district where he resides, which adds considerably to the expense of many litigations. In some very busy jurisdictions, where the evidence is taken entirely before the courts, the day of final hearing is being postponed indefinitely, and this can only be remedied by providing for the appointment of additional judges where needed.

The Supreme Court, in enacting rules relative to the production and preparation of records on appeal, has provided that the evidence taken in a cause "shall not be set forth in full, but shall be stated in simple and condensed form," and has also provided as to the manner in which the record shall be thus reduced and penalties for infraction of this rule <sup>35</sup> by attorneys and parties. In a great many cases, however, where the complete evidence has been printed below, both the trial court and the Court of Appeals have

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<sup>34</sup> Equity Rules of the District Court of the United States, Southern Dist. of N. Y., effective Feb. 1, 1913 (Rule 6).

<sup>35</sup> Federal Equity Rules 75, 76 and 77.



under the Act of Congress of February 13, 1911, consented to the filing of the record as used below, as the Transcript on Appeal, and have thereby complied with the spirit of the rules in saving the expense of transcribing and reprinting of the District Court record for the Appellate Court.

In some cases the courts of appeals have dealt summarily with counsel who have failed to reduce the record to proper proportions, by taxing the costs of reducing the record to them personally.

In one instance plaintiff's counsel, in a patent case, had caused to be bound in the appeal record a large number of patents taken out by the patentees of the patent sued on, simply to show that he was a prolific inventor, and the court, upon discovering this, ordered the record to be dismembered, all of the patents set up by the plaintiff except the one in suit to be physically removed from the record, and the record re-bound at the expense of the solicitor. This secured a reduction of the record to the extent of over three hundred pages.

To some courts, and a great many attorneys, the advantages of the reduction of the record on appeal by abstracting are not apparent, for evidence appearing in narrative form has an entirely different probative force than when appearing in the proper setting of question and answer with the objections noted, and may cause the Appellate Court to reach an entirely different conclusion than if it had examined the record in the question and answer form. The expense is oftentimes much increased by this procedure, as the abstracts are being contested in many cases. The way that the courts of appeals are treating this rule, however, makes it less objectionable than those opposed to its terms anticipated.

On the whole, it may be fairly said that the influence of the new rules is toward getting the old causes on the calendars cleaned up, disposing of all inactive cases and actually trying those which have been filed since the rules went into effect.

The Supreme Court has brought about the general result of speeding equity causes and lessening the expense of the trial of these cases by the new rules; its interpretation of the statutes which it has passed upon has also greatly eliminated the expense of preparing appellate records,<sup>36</sup> and thus to some extent further

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<sup>36</sup> *Rainey v. Grace & Co.*, 231 U. S. 703, 34 Sup. Ct. 242 (1914).

removed one of the most useless and unjustifiable costs in federal equity procedure.

The Supreme Court has likewise done everything in its power to clear its own docket of pending cases. Current reports show that instead of waiting for approximately three years before hearing a case pending before it, a hearing may be now had in about a year after the appeal is perfected.

Such action on the part of the Supreme Court itself is in many instances doing quite as much to stimulate prompt action in the disposition of equity causes as the rules promulgated by it.

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## IRREVOCABLE OFFERS.

## I.

IT is elementary that an offer not under seal and without consideration may be revoked at any moment prior to its acceptance, even though a stated time is given for deliberation, for in the Common Law this giving of time is viewed as at most a promise to keep the offer open, which, being without consideration, is not binding. It has recently been reasserted that even an offer in terms to remain open a stated time, given under seal or for consideration, may in all cases be revoked before the time expires so as to render a subsequent acceptance ineffectual though given within the time allowed.<sup>1</sup>

Suppose an offer is made to sell land for \$10,000, and in consideration of \$50 paid by the offeree the offerer agrees to keep the offer open for ten days. It is asserted that if the offerer communicates a revocation on the third day, for instance, an acceptance thereafter, though within the ten days, will not create a contract to buy and sell the land. It is admitted, of course, that the revocation exposes the offerer to an action for damages for the breach of his contract to keep the offer open. The contention is that, while the contracted obligation to keep the offer open is wrongfully broken and the wrongdoer is liable in damages, the wrong is effectual to revoke the offer. This smacks of the exploded notion that a promisor has an alternative "right" either to perform his promise or to pay damages for his non-performance,<sup>2</sup>

<sup>1</sup> Ashley, *The Law of Contracts* (1911), pp. 25-27.

<sup>2</sup> This fallacy is a very catching one and at first blush seems a sound generalization from the fact that ordinarily only damages can be recovered for a breach of contract. It was relied upon in *Lattimore v. Harsen*, 14 Johns. (N. Y.) 330 (1817) for a result since repudiated [see also *Munroe v. Perkins*, 9 Pick. (Mass.) 298 (1830)] and was unfortunately given currency in *The Common Law*, p. 301, by Justice Holmes, whose statement, says Pollock, "can only be regarded as a brilliant paradox." Pollock on Contracts, 3d Am. ed., p. 202 n. (g). The law regards damages assessed against the defendant as compensation for the wrong he has done, and not as the performance of an alternative "right." Decrees for specific performance and negative injunctions show that a promisor has no such alternative. That a decree for specific performance does not get the thing done at the time promised and is really

but Professor Ashley puts the proposition in this form: An irrevocable offer "is contrary to the legal conception of an offer,"<sup>3</sup> following Langdell, who said: "An offer . . . which the party making it has no power to revoke is a legal impossibility."<sup>4</sup> True, the latter did partly rest this dogmatic statement on the further assertion that "A contract incapable of being broken is also a legal impossibility," but the reason, at bottom, assigned by both authors is that no meeting of the minds results from an acceptance given after the offerer has signified his change of mind, even though by so signifying he has broken his agreement.

The error here is not a reversion to the notion that mutual assent necessary to the formation of a legal agreement means actual concordance of the inner thought or unrevealed intentions. All accept the figurative language that it is sufficient that a meeting of the minds appears in the expressions of the parties; that the law does not go behind the expressed intentions. Familiar examples are: (1) Where a change of mind is manifested by the offerer but not communicated to the offeree before the acceptance; here if the acceptance is within the time limit, express or implied, of the offer, even though there was no contract to keep it open, a contract arises. (2) So also if an offerer says what he does not mean, in terms and under circumstances that do not apprise the offeree of the discrepancy between intention and expression, a contract comprising the terms as expressed results from an acceptance. The offerer must stand by what he said, and cannot insist upon what he meant, no matter how clearly he can prove the latter. The error consists in overlooking the fact that the law may regard the wrongful revocation as unexpressed. If the law is that the wrongful revocation is entirely negligible and to be

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a lame specific reparation, illustrates a common defect of remedial justice. That a negative injunction commands the defendant merely not to sing for any other employer and does not affirmatively order the defendant to sing for the plaintiff, is also a confession of the inadequacy of remedial machinery. For similar reasons society regards compensatory damages as the best practical remedy for the wrongful breaking of ordinary contracts. No one finds fault with Pollock's definition of a contract as a promise which the law will enforce. The sanction is imperfect. Nevertheless the substantive law regards one who has contracted to do something as bound to do it. Moreover the remedy is not always faulty; see, for instance, *Manchester Ship Canal Co. v. Manchester Race Course Co.*, [1901] 2 Ch. Div. 37, referred to *infra*, p. 647.

<sup>3</sup> Ashley, *The Law of Contracts* (1911), p. 26.

<sup>4</sup> Summary of Contracts, § 178.



left out of account, the only operative expressions are the offer and the acceptance, manifesting mutual assent.

This is the sole question, does the law regard a wrongful revocation negligible? If, in breach of a contracted obligation to keep an offer open, the offerer attempts to revoke, may the "revocation" be treated by the offeree as unexpressed?

Why should mere words of revocation under such circumstances be given legal effect? The attempted revocation is not one of those *faits accomplis* which has altered the relations of the parties as a matter of fact and which courts may not ignore. If a *de facto* officer does an act affecting the rights of individuals the law may well give effect to the act, though the actor had no legal right to do it. So as to torts of a corporation committed in an *ultra vires* enterprise, the law may well say that they are the acts of the corporation, though done without right. In general, acts done beyond legal right when they have produced effects in fact must also produce legal consequence, but solely for the purpose of doing justice to the person injuriously affected, and in his behalf only. But why should mere words, wrongfully uttered, which produce no physical, material or actual effect be given legal effect and given that effect contrary to the desires and insistence of him who might be injured thereby and to effectuate the wrongful purpose of the utterer? Every one admits that a promise on a consideration to keep an offer open creates a contractual duty to keep it open; and that a revocation of such an offer would be wrong if legally operative at all. The question here, however, is not the bald one — why should he profit by his own wrong, for the admitted action for damages is a theoretical compensation for that; but the query is, why should any legal effect whatever be given to the words of revocation if the person to whom you have promised not to address them sees fit to ignore them?

If no satisfactory answer can be given to this question the supposed theoretical objection to irrevocable offer falls to the ground, and the result reached by the courts is sound in principle.

The cases are neither few nor in conflict. They are uniform to the effect that an offer under seal, where seals have not lost their efficacy, or for a consideration, is irrevocable.<sup>5</sup>

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<sup>5</sup> O'Brien v. Boland, 166 Mass. 481, 44 N. E. 602 (1896); Seyferth v. Groves & S. R. Co., 217 Ill. 483, 75 N. E. 522 (1905); Souffrain v. McDonald, 27 Ind. 269 (1866);

In several of these cases <sup>6</sup> striking illustration is given of the theory that the attempt at wrongful revocation is entirely negligible, for in them specific performance is decreed of the contract created by acceptance given after a "revocation" had been communicated.

It has also been held that an offeree of land may enjoin a proposed sale to another, the offerer having contracted to keep the offer open, on the ground, not that the offeree had an interest in the land (being merely an offeree he could not have), but because the contract to keep the offer open implied a negative promise not to sell the land to another within the time given.<sup>7</sup>

The injunction in this instance is more nearly equivalent to an affirmative order to the defendant to perform his promise than negative injunctions ordinarily are; the usual futility and impolicy of attempting governmental coercion of acts of personal service are not involved. In the cases referred to in the preceding paragraph, there is in effect a double specific performance; for, before decreeing specific performance of the ultimate contract, the courts, first, in holding the "revocation" ineffectual to prevent acceptance, hold the offerer specifically to his promise to keep the offer open.

Solomon Mier Co. v. Hadden, 148 Mich. 488, 111 N. W. 1040 (1907); Marsh v. Lott, 8 Cal. App. 384, 97 Pac. 163 (1908); Tibbs v. Zirkle, 55 W. Va. 49, 46 S. E. 701 (1904); Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150 (1904); Bradford v. Foster, 87 Tenn. 4, 9 S. W. 195 (1888); Watkins v. Robertson, 105 Va. 269, 54 S. E. 33 (1906); McMillan v. Ames, 33 Minn. 257, 22 N. W. 612 (1885); Smith v. Cauthen, 98 Miss. 746, 54 So. 844 (1911); Mueller v. Nortmann, 116 Wis. 468, 93 N. W. 538 (1903), holding death of offerer, where for a consideration he has agreed to keep the offer open, does not revoke the offer. And see Adams v. Peabody Coal Co., 230 Ill. 469, 82 N. E. 645 (1907).

The doctrine of the above decisions has been recognized by *dicta* in numerous cases, especially deliberate in the following: Weaver v. Burr, 31 W. Va. 736, 755, 8 S. E. 743, 754 (1888); Linn v. McLean, 80 Ala. 360, 4 So. 777 (1888); Couch v. McCoy, 138 Fed. 696 (1905); Mansfield v. Hodgdon, 147 Mass. 304, 17 N. E. 544 (1888); Cummins v. Beavers, 103 Va. 230, 48 S. E. 891 (1904); Willard v. Tayloe, 8 Wall. (U. S.) 557 (1869); Johnston v. Trippe, 33 Fed. 530 (1887); Peterson v. Chase, 115 Wis. 239, 91 N. W. 687 (1902); Frank v. Stratford-Handcock, 13 Wyo. 37, 77 Pac. 134 (1904); Black v. Maddox, 104 Ga. 157, 30 S. E. 723 (1898); Ross v. Parks, 93 Ala. 153, 8 So. 368 (1890); Murphy Thompson Co. v. Addington, 31 Ky. L. Rep. 176, 101 S. W. 964 (1907); Barnes v. Hustead, 219 Pa. 287, 68 Atl. 839 (1908).

<sup>6</sup> Souffrain v. McDonald, *supra*; O'Brien v. Boland, *supra*; Seyferth v. Groves & S. R. Co., *supra*; Solomon Mier Co. v. Hadden, *supra*; Marsh v. Lott, *supra*; Couch v. McCoy, 138 Fed. 696 (*semble*); and see McMillan v. Ames, *supra*.

<sup>7</sup> Manchester Ship Canal Co. v. Manchester Race Course Co., [1901] 2 Ch. Div. 37.



That the doctrine of irrevocable offers gives an illustration of specific enforcement that effectually gets the thing done as promised is no reproach to it. Remedial machinery need not always be inadequate.<sup>8</sup>

Professor Ashley says:

"Promises to convey property upon condition have been confused with contracts to keep an offer open, but they are very different. We have many instances of such conditional contracts, but contracts to continue an offer are not numerous.

"The courts frequently use language which would lead to the belief that the contract they are considering is to keep an offer open, but an examination of the facts will generally show a conditional promise to sell."<sup>9</sup>

It is quite true that a promise under seal or for a consideration to sell property subject to a condition to be performed by the promisee is to be distinguished from an offer to sell supplemented by a contract to keep the offer open, but it seems to be incorrect to say that the latter sort of undertaking is comparatively rare. If the common form of option contracts bears analysis as a conditional promise to sell, the doctrine of irrevocable offers would not apply. There would be a binding promise to sell enforceable upon the performance of the condition. It is to be noted that such a binding conditional promise to sell would be a unilateral contract, since if we assume a counter-promise to buy we pass from our hypothetical case of an option contract. Professor Langdell truly said:

"There is no doubt that A. may make a *binding* promise to sell certain property to B. on certain terms, while B. is left perfectly free to buy the property or not; and such a promise will, in most respects, confer the same right upon B. as if he had made a counter-promise to buy. But such a case . . . is not an offer contemplating a bilateral contract, but it is a complete unilateral contract."<sup>10</sup>

A.'s liability to convey is merely dependent upon the performance by B. of the designated condition, which he is free to per-

<sup>8</sup> See note 2, *ante*.

<sup>9</sup> Ashley, *The Law of Contracts* (1911), p. 26.

<sup>10</sup> Summary of Contracts, § 179. The word "*binding*" is italicized by the present writer.

form or not. In order to apply this construction to the ordinary option contract it must appear that the money paid down is understood as the consideration for the promise to sell, and that the notification, within the time given, of the promisee's willingness to take the property is merely a condition or one of the conditions to the promisor's liability to perform. Where, however, the sum paid down is small, particularly when it is not an advance upon the purchase price, as it will ordinarily not be where there is no counter-promise to buy, the true construction is that it is given not as the consideration of the promise to sell but as the consideration for granting time to deliberate. The same distinction applies as to the purpose of affixing a seal to such a proposal.

Consequently it seems that the courts are right in assuming that an offer to sell within a stated time, made under seal or for a consideration, should ordinarily be construed as (1) an offer to sell, and (2) a contract to keep the offer open. Before the consideration is paid there are two offers. Thus if A. says to B.: "In consideration of your paying me \$50, I agree to sell you my land within ten days for \$10,000." Here is an offer to sell the land (the principal offer) and an accessory offer to keep the principal offer open for ten days. If B. accepts the accessory offer by paying the \$50, an accessory contract arises to keep the principal offer open.<sup>11</sup>

It may be noted that in all of the cases cited above<sup>12</sup> the subject-matter of the offer was such that equity will specifically enforce a contract relating to it. Nevertheless it will be found that in none of them is it suggested that the irrevocability of "paid-for" offers<sup>13</sup> is confined to offers of such subject-matter. And while the writer has discovered very few cases involving subject-matter of such a nature that equity would not specifically enforce a contract relating to it, in which irrevocability of "paid-for" offers is

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<sup>11</sup> This is the construction usually adopted by the courts. Of all the cases cited *supra*, in note 5, only *O'Brien v. Boland* and *McMillan v. Ames* consider the other construction.

<sup>12</sup> In notes 5, 6 and 7.

<sup>13</sup> This expression "paid-for" offer is used in the remainder of this essay as a brief though faulty equivalent of "an offer under seal, where seals retain their common law force, or one for which a consideration has been given." The word "option" is ambiguous as to whether it is "paid-for" or not; and "option-contract" has sometimes led to confusing the "paid-for" offer with the ultimate or principal contract created by acceptance of the principal offer.



either held or stated,<sup>14</sup> it seems that, so far as irrevocability is concerned, no sound distinction can be made with reference to the subject-matter of the offer. The alleged objection that to hold any offer irrevocable involves the making of a contract without a meeting of the minds is the same regardless of the subject-matter. If the law disregards this objection in the one case it should do so in the other, and we may accept the proposition as broadly and flatly laid down in the cases that a "paid-for" offer cannot be revoked.

Only one possible exception to this broad statement has occurred to the writer, and this is a very narrow class of "paid-for" offers, a wrongful revocation of which would be operative to prevent acceptance because an acceptance would enhance the injury caused the offeree by the offerer's breach, and needlessly increase the damages to be recovered. It seems that this will be true in some cases where the "paid-for" offer contemplates the making of a unilateral contract; that is, where the acceptance is not a counter-promise express or implied, but the doing of an act. Offers contemplating unilateral contracts are relatively rare; public offers of reward for the detection or arrest of criminals or for the return of lost property are examples of the most common use of such offers. An instance in which such an offer has been made under seal has probably never been heard of, and the express giving of a consideration for such an offer must be very rare.

It is believed by the writer, however, that there is an implied contract supported by ample consideration to keep such offers open in more cases than is commonly supposed, a point to be elaborated in the second division of this essay. The making of such an offer under seal or for consideration is entirely permissible, and the relation to it of the doctrine in hand will have at least some theoretical significance.

Suppose A. makes an offer, under seal or for a consideration, to B. of \$1,000 for the drilling of a well 1000 feet deep on A.'s land, the offer making it plain that the acceptance called for is not a

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<sup>14</sup> *Simpson & Harper v. Sanders & Jenkins*, 130 Ga. 265, 60 S. E. 541 (1908) (option to purchase shingles to be manufactured) (*semble*); *Walker v. Bamberger*, 17 Utah, 239, 54 Pac. 108 (1898) (paid-for offer to sell an option to purchase shares of mining stock; option on an option); and see *Dambmann Bros. v. Lorentz*, 70 Md. 380, 17 Atl. 389 (1889).

promise either express or implied, but the doing of the work itself, and in terms the offer is to be open for 60 days. If after 30 days, the work being not begun or only partly done and the offer therefore not yet accepted, A. notifies B. that he does not want the work done, this attempted revocation should be construed as a repudiation of A.'s contracted obligation to keep the offer open. The doctrine of *Clark v. Marsiglia*<sup>15</sup> is applicable. B. must heed this repudiation and stop work. A.'s liability in this case is only for the damage caused by the breach of his contract to allow B. 60 days for acceptance. Since finishing the work is the only mode of accepting the principal offer, and the rule against enhancement of damages prevents B.'s going on, we have an example where a revocation is effectual to cut off acceptance. This exception is entirely due to the rule in the law of damages that the plaintiff may not charge the defendant with consequential damages which the plaintiff might have avoided if he had acted reasonably.

"In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect of the part left unexecuted."<sup>16</sup> As Professor Williston says: "If a man engages to have work done, and afterwards repudiates his contract before the work has been begun or when it has been only partially done, it is inflicting damage on the defendant without benefit to the plaintiff to allow the latter to insist upon proceeding with the contract."<sup>17</sup>

The discussions of this rule requiring a repudiation to be heeded where ignoring it would needlessly enhance damages have been confined to problems in the performance of bilateral contracts, but it is evident that it equally applies in the narrow class of cases here suggested, of "paid-for" offers contemplating acceptance by some performance, though it may be that there are exceptions, even in this exceptional class, where ignoring the revocation and accepting by completing the performance will not needlessly enhance damages, to which the general rule will be applicable that a wrongful revocation is entirely negligible.

<sup>15</sup> 1 Denio (N. Y.) 317 (1845).

See Professor Williston's discussion in his edition of Wald's *Pollock on Contracts*, pp. 348-350; Sedgwick on *Damages*, 9 ed., § 636 ff.

<sup>16</sup> This is the oft-quoted statement by the court in *Clark v. Marsiglia*, *supra*.

<sup>17</sup> Williston's *Wald's Pollock on Contracts*, p. 349.



It may be repeated that the rule requiring a repudiation to be heeded is never applicable where disregarding it would not needlessly enhance damages.<sup>18</sup> It is for this reason that it does not apply to a "revocation" of "paid-for" offers contemplating the making of *bilateral* contracts. Consequently in all the cases referred to above<sup>19</sup> of "paid-for" offers to buy or sell property, which contemplate acceptance by a counter-promise to sell or buy, the courts properly take no note of the doctrine. Where the acceptance of the "paid-for" offer is merely a promise, it is clear that acceptance will not enhance damages.

If any doubt be entertained, it will be dispelled by a momentary consideration of the nature of the right to damages and the measure of damages for the repudiation of an obligation to keep an offer open. For some purposes, for instance in taxation,<sup>20</sup> it might be necessary to regard the "paid-for" offeree's option as a property right and to estimate its value as a mere right to accept or reject, and this may need to be done at a time when he has not exercised his option and while it is still entirely speculative whether he will accept or not. This value in many cases is extremely difficult of ascertainment, for it is not every option that has a market value. Should any court apply this principle in measuring the damages for a repudiation of a "paid-for" offer, it would have to regard the repudiation as destroying the option-holder's property right; but this view would scarcely lead to practical results. A better rule may be borrowed by analogy from cases holding that the damages for a breach of a contract to make a contract are the profits that would have resulted from the second contract had it been concluded.<sup>21</sup>

Consequently whether after repudiation the offeree brings an action as for a breach of the contract to keep the offer open, or accepts the offer and sues as for a breach of the principal contract, the measure of damages will be the same. Accordingly he is free to take the latter course, that is, where the resultant con-

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<sup>18</sup> 2 Sedgwick on Damages, 9 ed., § 636 c; Williston's Wald's Pollock on Contracts, p. 350.

<sup>19</sup> Foot-notes 5, 6, 7 and 14.

<sup>20</sup> Not as a taxable credit of the offerer, but as the property of the offeree. Cf. cases cited in 34 L. R. A. (N. S.) 1221.

<sup>21</sup> Sedgwick on Damages, 9 ed., § 622 c.

tract is bilateral. It is not contended that, having accepted and brought the principal contract into existence, he has a right in all cases to go ahead with performance on his side and hold the other to full performance or the contract price; this will depend entirely upon the nature of the principal contract. If that ultimate contract is of the class to which the doctrine of *Clark v. Marsiglia* applies, the fact that the repudiation was announced before the contract was created seems immaterial, because the innocent party knows before he begins his performance that the other party has renounced.

Though the offeree, where the "paid-for" offer contemplates a bilateral contract, may accept after a repudiation, the question may arise whether he must do so as a prerequisite to bringing an action for damages. It is assumed above that he need not. That he must do so before suing for specific performance of the principal contract is quite clear. Logically the same is true if he sues for damages as for a breach of the principal contract. If, however, he sues as for a breach of the defendant's promise to keep the offer open, the gist of the action is the repudiation of that promise and the measure of damages is the profits that would have been gained from the prospective contract. The defendant may show that there would have been no profit, but it would not lie in his mouth to say that the plaintiff had not accepted the offer and entitled himself to a profit, if there would have been any, for the ready answer is that defendant's repudiation dispensed with acceptance by rendering it vain,<sup>22</sup> for in this litigation acceptance figures only as a condition to the defendant's liability for the profits, the suit not being on the ultimate contract. If the suit were for breach of the latter contract, acceptance would appear in another light, *viz.*, as an essential element to the formation of the contract sued on.

This principle that the defendant's wrongful revocation dispenses with acceptance of the principal offer as a condition precedent to his liability for breach of the contract to keep the offer open is obvious in the cases just discussed, of "paid-for" offers contemplating unilateral contracts where the rule against enhancement prevents the offeree from completing performance, for since he

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<sup>22</sup> But see *Abbott v. '76 Land & Water Co.*, 53 Pac. 445 (Sup. Ct. Cal., 1898).



cannot complete he cannot accept, completion being acceptance. Acceptance is certainly dispensed with.

Summing up: An offer under seal, where seals have not lost their efficacy, or for consideration, may be regarded as a principal offer and a contract to keep that offer open for the express or implied time given. Such an offer cannot be revoked. That is, the principle that an ordinary offer is revocable at any time before acceptance is entirely inapplicable. An attempt to recall or renounce the offer can be nothing more than a repudiation of the contracted duty to keep the offer open. If the offer contemplates a bilateral contract the offeree may ignore the repudiation and accept the offer. When he has so accepted he has whatever form of remedy would have been available to him in case of a breach of the ultimate contract. If the nature of that contract permits he may sue in equity for specific performance. In any case he has an action for damages as for a breach of the ultimate contract without putting the defendant further in default, unless in a jurisdiction where his acceptance might be construed as "keeping the contract alive for the benefit of the other party."<sup>23</sup>

Even without accepting, it seems that a plaintiff who is content with damages has an equally fruitful action based upon the repudiation of the contract to keep the offer open. Acceptance, however, is logically a prerequisite to suit as for breach of the ultimate contract, either for specific performance or damages.

But, excepting extraordinary cases, if the "paid-for" offer contemplates a unilateral contract, the rule against needless enhancement of damages requires the offeree to heed the repudiation and his only remedy in such case is an action for damages for the repudiation of the contract to keep the offer open.

## II.

### OFFERS CONTEMPLATING UNILATERAL CONTRACTS.

Where an offer contemplates a unilateral contract, that is, where it is made in terms that call for acceptance not by a promise either express or implied but by the doing of an act or a series of acts,

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<sup>23</sup> See the rules as to repudiation formulated in the English and Illinois cases, as discussed by Professor Williston in his edition of Wald's *Pollock on Contracts*, pp. 348-350.

to admit that the offer may be withdrawn of right after the act is begun, or the series of acts is partly done, would work a hardship on the offeree in many cases. It has generally been supposed, however, that in all such cases the offerer merely exercises a legal right in revoking and that consequently the offeree is without a remedy, unless it be a quasi-contractual one, which is doubtful in any case, and at most would exist only if the circumstances were such that the partial performance "enriched" the offeree. It is to be assumed that the offer is not under seal, and no consideration is expressly given to keep it open. If it should be found that a promise for a consideration, to keep such an offer open, is inferentially involved in such a proposal the principles of irrevocable offers would apply and the hardship would not exist. It is the purpose of the following discussion to ascertain whether such implied contract is made in such cases. But first the problem and its supposed difficulties should be set forth.

In *Biggers v. Owen*<sup>24</sup> a reward had been offered for "delivery (of the person who had committed a designated crime) to the sheriff, . . . with evidence to convict." The plaintiff delivered a woman to the sheriff. On trial before a committing magistrate the woman was discharged for want of sufficient evidence. The offer was then withdrawn. Subsequently the woman was indicted and convicted of the crime upon evidence furnished by the plaintiff. In an action to recover the reward, the Georgia court held that the plaintiff was not entitled to recover. The only reason for the decision is thus expressed: "An offer of reward is nothing more than a proposition; it is an offer to the public; and until someone complies with the terms or conditions of that offer, it may be withdrawn." The inference from the opinion is sound that there is no acceptance of such an offer until the acts called for are completed, but was the court right in its assumption that it was dealing with an ordinary revocable offer?

Opposed to *Biggers v. Owen*, on the latter point, is the opinion of Preston, J., in the Supreme Court of Louisiana. A reward was offered for the conviction of an incendiary, and plaintiffs, suing for the reward, had procured an arrest and were ready with evidence to convict; but the offer was withdrawn before conviction

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<sup>24</sup> 79 Ga. 658, 5 S. E. 193 (1887).



and even before the evidence was given at the trial. Justice Preston, dissenting from an opinion in which the majority disposed of the case upon other grounds, said: "The prosecution having been commenced, at the instance of the plaintiffs, they acquired an inchoate right to the reward, which the defendants could not afterward defeat."<sup>25</sup>

Professor Williston has thus stated the problem:

"One of the most troublesome questions in regard to revocation relates to the right of an offerer to revoke an offer to make a unilateral contract after the consideration has been partly performed but before it has been completely performed. On principle it is hard to see why the offerer may not thus revoke his offer. He cannot be said to have already contracted, because by the terms of his offer he was only to be bound if something was done, and it has not as yet been done, though it has been begun. Moreover, it may never be done, for the promisee has made no promise to complete the act, and may cease performance at his pleasure. To deny the offerer the right to revoke is, therefore, in effect to hold the promise of one contracting party binding, though the other party is neither bound to perform nor has actually performed the requested consideration. The practical hardship of allowing revocation under such circumstances is all that can make the decision of the question doubtful. The only reference to the matter in the English books is in *Offord v. Davies*, 12 C. B. n. s. 748 (1862), where in the course of the argument Williams, J., asked: 'suppose I guarantee the price of a carriage to be built for a third party who, before the carriage is finished, and consequently before I am bound to pay for it, becomes insolvent, may I recall my guaranty?' The counsel replied: 'Not after the coach builder has commenced the carriage,' and Earle, C. J., added: 'before it ripens into a contract, either party may withdraw, and so put an end to the matter. But the moment the coach builder has prepared the materials he would probably be found by the jury to have contracted.' A somewhat similar suggestion is made by the Illinois Supreme Court in *Plumb v. Campbell*, 129 Ill. 101, 107, 18 N. E. 790 (1888): Appellant (the offerer) could be bound in three ways: 'First, by appellee engaging within a reasonable time to perform the contract on his part; second, by beginning such performance in a way which would bind him to complete it, and third, by actual performance.' See also *Blumenthal v. Goodall*, 89 Cal. 251, 26 Pac. 906 (1891); *Los Angeles Traction Co. v.*

<sup>25</sup> *Cornelson v. Sun Mutual Insurance Co.*, 7 La. Ann. 345, 347 (1852). This opinion does not rest upon any principle peculiar to Louisiana law. The common-law doctrine of consideration prevails in that State.

Wilshire, 135 Cal. 654, 658, 67 Pac. 1086 (1902); *Society v. Brumfiel*, 102 Ind. 146, 1 N. E. 382 (1885).

"The difficulty with these solutions of the problem is that they fail to take into account the offerer's right to impose such conditions as he chooses in his offer. An offer conditional on the performance of an act does not become a contract by the doing of anything else, such as part performance or giving the offerer a promise to do the act. See *White v. Corlies*, 46 N. Y. 467 (1871). Nor can it be admitted that beginning performance by one to whom an offer of a unilateral contract has been made imports any promise on his part to complete the performance. The decision in *Biggers v. Owen*, *supra*, therefore, seems sound, although the result is harsh. In that case it was held that an offer of reward might be withdrawn, after the plaintiff had nearly completed the performance requested. See also *Cook v. Casler*, 87 N. Y. App. Div. 8, 83 N. Y. Supp. 1045 (1903)."<sup>26</sup>

The cases referred to by Professor Williston other than *Biggers v. Owen* are not cited as directly in point. They have been discussed at length in an article by Professor Ashley,<sup>27</sup> who makes a tentative suggestion that an equitable estoppel might sometimes be invoked as a solution of the difficulty. He suggests that the manifest injustice done the offeree by a revocation after performance has begun might be held sufficient ground to estop the offerer's revoking. He pertinently inquires, "Have we too readily acquiesced in the idea that an offer must necessarily be revocable under all circumstances?" He says, however, "certainly these cases do not fall strictly within the equitable doctrine of *estoppel in pais*, as that subject has heretofore been developed, but a doctrine somewhat analogous thereto and depending upon the same ideas would seem to be possible, even though there may be some more suitable nomenclature." Stretching the doctrine of estoppel beyond the vaguest meaning in which it is now applied will scarcely meet with approval. Moreover, Professor Ashley admits that his suggestion does not meet the two cases that he puts as most typical.

Sir Frederick Pollock has taken the problem too lightly.<sup>28</sup> In his last English edition he says:

<sup>26</sup> Wald's *Pollock on Contracts*, 3 ed., p. 34, note 39.

<sup>27</sup> 23 HARV. L. REV. 159. See also Ashley, *The Law of Contracts* (1911), pp. 78-88.

<sup>28</sup> He refers to Professor Ashley's article as "a very ingenious exercise in legal sophistry."



"The speculative question has lately been asked at what point of time acceptance by an act is complete, and it is suggested that A. may request B. to do something, say to move a piece of furniture, for reward which A. names, that B. may do a substantial part of the work, and A. may revoke his offer at any time before the work is complete, leaving B. without a remedy, or at least any remedy on a contract. But surely the acceptance is complete as soon as B. has made an unequivocal beginning of the performance requested, a *commencement d'exécution*, to use the term familiar in French law. Whether anything is payable before the whole of the work is done depends on the terms express or implied of A.'s offer on which B. acts. As a matter of fact A.'s offer will almost always be a conditional offer, and will become, on acceptance, a promise conditional on the work being done within a reasonable time and otherwise competently. Such a conditional promise is still a promise, and wholly different from a revocable offer."<sup>29</sup>

On just what theory the beginning of performance is an acceptance is not explained. Of course if we were discussing a case where the offer expressly called for a counter-promise as an acceptance, or was open to the inference that a counter-promise was called for, without indicating the mode of expressing the counter-promise, the beginning of performance might well be taken as the expression, or manifestation, of such promise. In that case we would be dealing with an offer contemplating a bilateral contract. By hypothesis we are concerned with a case where such an inference is excluded, the case of an offer actually contemplating a unilateral contract.

In case of doubt the courts interpret an offer as contemplating a bilateral contract. That seems to be what is meant in *Offord v. Davies*, *supra*, by the remark of Erle, C. J.: "But the moment the coach builder has prepared the materials, he would probably be found by the jury to have contracted." This, too, is the process of reasoning adopted by Justice Holmes in *Martin v. Meles*.<sup>30</sup> Yet offers contemplating unilateral contracts are in fact made, and the question remains, are such offers ordinarily revocable after performance has begun? For though we discard Pollock's idea that beginning performance is acceptance, is there not truth in Judge Preston's suggestion that the commencement of perform-

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<sup>29</sup> Pollock, *Principles of Contract*, 8 ed., p. 26.

<sup>30</sup> 179 Mass. 114, 60 N. E. 397 (1901).

ance renders the offer irrevocable? Let us assume a concrete case: A. says to B., "I have had enough of your promises in the past and want no promise from you, but if you will put my sugar-house machinery in good repair I will pay you \$100 for the job, and if you will begin immediately I will give you a reasonable time to complete the work."

Are there not two offers here — one, the principal offer of \$100 for the repair of the machinery; another, or collateral, offer to keep the principal offer open for a reasonable time if the offeree begins work at once? The principal offer contemplates acceptance by the act of repairing the machinery, and no contract will result from it until the machinery is fully repaired. The collateral offer also contemplates a unilateral contract, the acceptance to be beginning the work at once. If the work is begun at once there is a contract to keep the principal offer open for a reasonable time. By beginning immediately the offeree has "paid-for" the offer. So if the principal offer had fixed a definite time for completing the work, the commencement of the work would be the acceptance of, and consideration for, the implied promise to keep the principal offer open for the time so fixed in it.

The offeree is thus protected by a contract to keep the offer open. Should the offerer thereafter attempt to withdraw the offer, this repudiation of his contractual obligation would give the offeree an action for damages, and it may be that in exceptional cases the offeree may ignore the repudiation, complete the performance and hold the offerer to the resulting contract.

The analysis above suggested fully accords with the intentions of the parties, as it must in order to be admissible; whether the implied contract exists depends wholly upon the intentions of the parties. That ordinarily in this sort of dealings such an implied contract is contemplated is shown by the fact that by it alone will both parties be secured the intended positions. The offerer incurs no liability on his principal offer until the work is done, not because it is a condition in a contract already made that the doing of the work is to precede payment — a bilateral contract could be made to serve equally well for that — but because the principal offer, *viz.*, to pay for the work, will not ripen into a contract at all until the whole work is done: the offerer has only given the offeree an



option to reject the principal offer or accept it by completing the act or acts called for, within the time limit.

Thus the suggested analysis nowise interferes with securing to the offerer absence from liability except upon punctual and otherwise precise performance by the offeree, the principal object in mind when an offer contemplating a unilateral contract is made. The offerer, as Professor Williston says, can impose such conditions as he pleases; he may make the time for acceptance impossibly short if that is his whim, or make the task ever so difficult in other respects, and no liability beyond what may result from a repudiation of the collateral contract can possibly arise unless the task is completed within the time and in strict compliance with all other conditions.

On the other hand, the offeree is secured the intended position. By commencing the work he is not bound to complete it. The principal offer contemplates a unilateral contract. By commencing the work the offeree has only accepted the collateral offer and paid for the option of accepting or rejecting the principal offer. He is secured the very opportunity which in such cases it is normally expected he shall have, *i. e.*, an opportunity to see whether he can accomplish the work within the allotted time and entitle himself to the contemplated compensation. In short, the analysis here suggested does not vary the position of the parties from that depicted above in the quotation from Professor Williston, with the single exception that the revocation of the offer does not leave the offeree devoid of remedy.

In the case above put, the inference that the principal offer carries with it the implied offer to keep the former open if the work is begun within a reasonable time is made easy by the explicitness of the language used, but does not the inference come clearly in less explicit cases? Take the facts of *Biggers v. Owen*, an offer of reward for delivery to the sheriff with evidence to convict. Does not the offerer fairly say that if you produce substantial results within a reasonable time, I will give you a further reasonable time to complete? In the case of offers made to the public, *i. e.*, to an indeterminate person, if X. alone makes a substantial beginning the option created would work in his behalf only, and the offer could still be withdrawn as to all others.

The inference is stronger in the sugar-house case because from

the beginning of the work the offerer is presumably being enriched. The inference of the collateral offer is purely one of fact, however, and the existence of a benefit is not a *sine qua non*. The inference can properly be drawn whenever and only when the proposition made would reasonably be taken to offer a reasonable or a stated time for performance in exchange for the commencement of it within a stated or reasonable time.

Any express or implied reservation of a right to revoke at any time will negative the inference of the implied accessory contract. If the offer reasonably construed proposes no such contract there is no justice in enforcing one against the offerer because some abnormal person has been misguided by it. An offerer is still free to impose such terms as he pleases, and he can make an offer contemplating a unilateral contract without annexing an option to it. The difficulty with the current conception is that it takes too harsh a view of the ordinary offerer, attributing to his proposal a more selfish meaning than it bears when reasonably construed, and a meaning which comes as a shock to a normal offeree, in ordinary cases.

Suppose a promise of a sum of money is made in consideration that the offeree refrain from a bad habit for five years. First the court must consider whether the offer contemplates a bilateral contract. Was it meant that the offeree should promise, either by word or act, binding himself to refrain? If not, the offer contemplates a unilateral contract; that is, that there is to be no contract to pay the money until the act called for is done. What act? Refraining for the whole period. Was the offeree to get nothing if he refrained only two years? Obviously he was to get nothing. But does that lead us to the other extreme, that if he does refrain for two years and is still refraining, the offer may be withdrawn without liability? Surely that was not in the contemplation of the parties. As Professor Ashley says, it is a lame thing to tell the offeree now that he should have made a bilateral contract. That is what the parties did not want. The offerer did not seek to bind the offeree, but to leave him free to accept or reject. The offerer, on his part, wanted only to be free, until the offeree did what he called for, from any contractual obligation to pay the money. On the other hand, it was contemplated that the offeree should have the opportunity to do it, and thereby create a contract. The



fair inference is that an implied proposal was made to keep the offer open for the designated time in consideration that the offeree commenced to refrain.

Apart from the above interpretation by which an implied promise to keep the offer open is found in some cases, there may be question as to the consideration for this promise, but surely not a serious one. The finding of the consideration, for keeping the offer open, in the act of beginning performance is soundly in accord with the doctrine of consideration if the offer reasonably bears the interpretation above put upon it. Any future act which the offeree is not otherwise legally bound to do may be consideration for a promise, whatever that act may be, if it is the act called for in exchange for the promise, *i. e.*, called for either expressly or inferentially in the light of a reasonable construction.

It has been held that a public notice that an auction is to be without reserve is an offer which is capable of acceptance by the acts of attending and bidding the highest, and while if the auctioneer refuses to knock down the goods there is no contract to sell<sup>31</sup> there is a contract with the auctioneer of which he commits a breach by refusing to knock them down.<sup>32</sup>

In short, *Warlow v. Harrison* holds that the announcement of an auction sale without reserve is equivalent to a proposal, that if you attend the sale and bid the highest, I, the auctioneer, agree to accept your offer. That is, the mere acts of attending and bidding highest are the acceptance and consideration for the auctioneer's promise. This is true only if the auction notice may reasonably be construed to contemplate those acts in that light.

So it has been held that a public announcement of train schedules is a promise-offer to run trains at the times scheduled, contemplating as acceptance and consideration the mere act of entering the station with intention of becoming a passenger, though no ticket has yet been bought.<sup>33</sup> This decision goes further than the American case of *Sears v. Eastern R. R. Co.*,<sup>34</sup> which holds that the purchase of a ticket is an acceptance of an offer to run the train at

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<sup>31</sup> *Payne v. Cave*, 3 Term Rep. 148 (1789).

<sup>32</sup> *Warlow v. Harrison*, 1 E. & E. 295 (1858).

<sup>33</sup> *Denton v. G. N. Ry. Co.*, 5 E. & B. 860 (1856).

<sup>34</sup> 14 Allen (Mass.) 433 (1867).

the announced time, or at least not to arbitrarily change the time of the train.<sup>35</sup>

Both *Warlow v. Harrison* and *Denton v. G. N. Ry. Co.* have been doubted on the ground that the proposals made to the public, under consideration in those cases, could not reasonably be construed as offers contemplating acceptances by the acts which the courts held were acceptances.<sup>36</sup> If the offers did call for those acts there could be no doubt of the sufficiency of those acts as consideration. It is the interpretations that are questionable, because they do not seem to square with what persons ordinarily mean by such words and conduct; whereas the analysis suggested for the situation discussed in this article seems to truly interpret the intention of the parties. The content of any offer, that is, what is actually the offer made, is in legal contemplation the meaning which the terms convey or should convey to a reasonable offeree, under the circumstances; and it is submitted that ordinarily the person to whom an offer contemplating a unilateral contract is made understands that if he undertakes the proposed task the proposer is bound to allow him a reasonable time or the stated time, if any, to complete it.

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<sup>35</sup> In neither of the last two cases was there a reservation by the company of a right to change the time of trains without notice, which is the common practice at the present, a practice which strips both of the cases of any practical application to-day.

<sup>36</sup> Pollock on Contracts, 3 Am. ed., p. 19.



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COMPENSATION FOR THE TAKING OF PROPERTY AND THE POLICE POWER. — The constitutional guaranty against the taking of private property without compensation was recently invoked without success before the Supreme Court of the United States. A city connected two lakes in a park system by a canal with sidewalks on each side, causing a railroad whose track ran across the line of the canal to build a bridge. Compensation was allowed for the land taken, but not for building and maintaining the bridge. *Chicago, M. & St. P. Ry. Co. v. City of Minneapolis*, 34 Sup. Ct. 400.

An implied reservation by the state, in incorporating or granting eminent domain to a railroad, of a right to acquire easements over its right of way, would of course relieve the public of making any compensation at all, even for the land;<sup>1</sup> but, when the power of eminent domain is relied on, it is at first difficult to see why the public should not pay for the consequential damages as well as for the land.<sup>2</sup> The theory underlying the court's decision is that, when an easement is acquired by eminent domain, obedience to the police power imposes on the railroad the duty of provid-

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<sup>1</sup> That there is such an implied reservation is somewhat vaguely suggested in some cases, but never applied logically. Apparently all that is meant is that the state does not bargain away its police power when it incorporates a railroad and gives it the right of eminent domain. See *Cincinnati, I. & W. Ry. Co. v. Connersville*, 218 U. S. 336, 343, 344.

<sup>2</sup> See LEWIS, *EMINENT DOMAIN*, 3 ed., § 686, for a long list of cases supporting the proposition that when a part is taken just compensation must be made for the consequential damages to the remainder.

ing for the public safety, which may in some cases require the building of a bridge.<sup>3</sup> That a railroad must guard against injuring the public, although the conditions involving danger are forced upon it, seems well settled; for, in the case of a subsequently opened highway, it must maintain gates, flagmen, cattle guards, bridges at dangerous grade crossings and the like, without compensation.<sup>4</sup>

As far as these readjustments are for the purpose of protecting the public from danger, the expense may rightfully be imposed on the railroad. That compensation is not required whenever the deprivation is justified under the police power is the commonly accepted statement of the rule. But some modern definitions of the police power may lead to confusion, since they are broad enough to include the taking of property for almost any purpose beneficial to the public as a whole.<sup>5</sup> If the police power is "but another name for the power of government,"<sup>6</sup> and "extends to all great public needs,"<sup>7</sup> and if compensation be denied whenever it is exercised, it is obvious that there is nothing left of the constitutional guaranty. But if it is borne in mind that these broad definitions refer to the interests of society, which it is the purpose of the police power to protect, and that it is only deprivation of property in the exercise of protective power which requires no compensation, then the confusion caused by the broad definitions is avoided.<sup>8</sup> Whenever the right to compensation for property and incidental expense is invoked, the emphasis should be placed on the purpose of the taking. The test is whether property is condemned to promote an affirmative public undertaking, or, in other words, to confer an added benefit to the public; or whether, to prevent harm to an established public interest, a deprivation of property is necessary, either in the form of an imposition of expense, or of the actual taking or destruction of property which participates in causing a public detriment.<sup>9</sup>

<sup>3</sup> See same case in the Supreme Court of Minnesota, 115 Minn. 460, 465, 133 N. W. 169, 171.

<sup>4</sup> New York & N. E. R. R. Co. v. Bristol, 151 U. S. 556; Chicago, B. & Q. R. R. Co. v. Chicago, 166 U. S. 226; Chicago, B. & Q. R. R. Co. v. Nebraska, 170 U. S. 57; No. Pac. Ry. Co. v. Duluth, 208 U. S. 583; Cincinnati, I. & W. Ry. Co. v. Connersville, 218 U. S. 336; State ex rel. Minneapolis v. St. P., Minn. & Man. Ry. Co., 98 Minn. 380, 108 N. W. 261; LEWIS, EMINENT DOMAIN, 3 ed., § 244.

<sup>5</sup> "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." Chicago, B. & Q. Ry. Co. v. Drainage Commissioners, 200 U. S. 561, 592, 26 Sup. Ct. 341, 349. See also Bacon v. Walker, 204 U. S. 311, 317, 27 Sup. Ct. 289, 291; Noble State Bank v. Haskell, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188; Mutual Loan Co. v. Martell, 222 U. S. 225, 233, 32 Sup. Ct. 74, 75.

<sup>6</sup> See Mutual Loan Co. v. Martell, 222 U. S. 225, 233, 32 Sup. Ct. 74, 75.

<sup>7</sup> See Noble State Bank v. Haskell, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188.

<sup>8</sup> See Chicago, B. & Q. Ry. Co. v. Drainage Commissioners, 200 U. S. 561, 592, 26 Sup. Ct. 341, 349.

<sup>9</sup> See Philadelphia v. Scott, 81 Pa. St. 80, 85; FREUND, POLICE POWER, § 511; RANDOLPH, EMINENT DOMAIN, § 23.

The familiar governmental power of regulating public-service companies is to be distinguished from either the police power or eminent domain. It is an inherent power of government similar to, but not the same as, the protective police power, because it does more than protect. On the other hand, it is distinguished from the power of eminent domain in that it is to be exercised only to further the purposes of the public service involved. It is like eminent domain, however, in that a reasonable compen-



The principal case presents a difficult question in the application of this test. On the one hand, there is the element of protection of the public in the use of its easement, in that the travel on the sidewalks and canal is made safer. On the other hand, the very nature of a canal necessitates the building of a bridge aside from reasons of public safety.<sup>10</sup> The expense of an ordinary bridge should be chargeable to the creation of this new public right. The railroad theoretically should bear only the added expense necessary in making the bridge of such form as will insure against danger to the public passing underneath. Because of the difficulty in differentiating the two elements involved, the result of the principal case may perhaps afford rough justice, but it is submitted a more just and scientific result could have been reached by some attempt at differentiation by expert estimate. In so doing, what seems an inroad on the constitutional guaranty against the taking of private property without compensation could have been avoided.

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RIGHT OF RECOVERY FOR TESTAMENTARY LIBEL. — A testator, leaving a small bequest to his niece, described her in the will as the illegitimate child of his brother. A recovery was allowed against the estate of the deceased in an action of libel. *Harris v. Nashville Trust Co.*, 162 S. E. 584 (Tenn.). The court argues that, although the principle *actio personalis moritur cum persona* causes a tort action accruing during the life of the wrongdoer to abate, the peculiar fact in the principal case that the wrong resulting from the tortious act occurred only after the death of the tortfeasor renders the maxim inapplicable.<sup>1</sup> The question of the survival or creation of rights after death, as a result of obligations incurred or acts done during the life of the deceased, is rendered difficult by its historical development.

Historically the earliest common law seems to have considered that death terminated all rights and obligations. Since personal rights and their correlative duties could only exist *inter partes*, after death this double relation was impossible; and substitution, as well as assignment *inter vivos*, was thought inconsistent with the personal nature of the obligations.<sup>2</sup> The non-transferability of choses in action to-day is traceable to the same idea.<sup>3</sup> With the establishment of a right to inherit or to acquire property by testamentary disposition, the notion developed that an obligee might have rights, arising at death, in the prop-

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sation is always ultimately contemplated, regulation amounting to confiscation being unconstitutional.

<sup>10</sup> See dissenting opinion in principal case when in Minnesota Supreme Court. *Chicago, M. & St. P. Ry. Co. v. City of Minneapolis*, 115 Minn. 460, 473, 133 N. W. 169, 174.

<sup>1</sup> Although the possibility of a tort being committed in the publication to the attesting witnesses during the testator's life is conceded by the court, the discussion is confined to the re-publication in the probate of the will.

<sup>2</sup> See 3 STREET, *FOUNDATION OF LEGAL LIABILITY*, ch. vi; 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW*, 2 ed., 258. For discussion of the early idea that all property interest ceased at death, see BIGELOW, *THEORY OF POST-MORTEM DISPOSITION*, 11 HARV. L. REV. 69; GROSS, *MEDIEVAL LAW OF INTESTACY*, 18 HARV. L. REV. 120.

<sup>3</sup> See 3 STREET, *FOUNDATION OF LEGAL LIABILITY*, 62.

erty of the deceased, distinct from those merely personal rights which, as shown by the foregoing discussion, abated with the death of the obligor.<sup>4</sup> Of the obligations existing before death the first to survive were promises to pay money where the heirs were specifically named as obligors.<sup>5</sup> Before the end of the thirteenth century, rights of action against an executor were given to any creditor who had a sealed writing for his debt.<sup>6</sup> A debt, it will be remembered, was formerly thought of as property, the lender supposing himself to own a sum of money in the possession of the borrower without owning any particular coins.<sup>7</sup> The development of the action of assumpsit led to the extension of revival to contract actions in general, apparently on the ground that the principle deducible from the early cases was that, unless the obligor had a right to wage his law, no contractual obligations abated at death.<sup>8</sup> The original idea of a tort right of action, on the other hand, was connected with revenge.<sup>9</sup> But in case the suit was in substance for restitution, the rights involved were thought of as connected with the property rather than with the person of the deceased. By judicial legislation in the end of the sixteenth century, tort actions were held to survive where the estate had been enriched by accretion from the wrongful taking.<sup>10</sup> This right was confined by later cases to waiving the tort and suing in quasi-contract.<sup>11</sup> At common law replevin did not survive against the executors.<sup>12</sup>

Apart from early statutes, therefore, the common-law exceptions seem confined to cases where a party expressly covenants to bind his heirs, or where he incurs an obligation in his life time, the nature of which was originally associated with the property, rather than merely with the person, of the deceased.<sup>13</sup>

Analytically the common-law distinction as to survival in favor of rights of action founded on contract is illogical.<sup>14</sup> As far as the personal

<sup>4</sup> See 3 STREET, FOUNDATION OF LEGAL LIABILITY, 62 ff.

<sup>5</sup> The original idea seems to have been that one may put an obligation upon the heirs and assigns into whose hands his property will eventually devolve. That the heirs' legal liability was early limited to the value of the property inherited suggests that the covenant was practically thought of as binding the land itself.

<sup>6</sup> See 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 343.

<sup>7</sup> See TERRY, PRINCIPLES OF ANGLO-AMERICAN LAW, § 147.

<sup>8</sup> See AMES, HISTORY OF ASSUMPSIT, 2 HARV. L. REV. 1, 16; Pinchon v. Legate, 9 Rep. 86; Sanders v. Esterby, Cro. Jac. 417.

<sup>9</sup> See WIGMORE, RESPONSIBILITY FOR TORTIOUS ACTS: ITS HISTORY, 7 HARV. L. REV. 315; POLLOCK, TORTS, 9 ed., 63 ff. It has even been suggested that the word *personalis* in the maxim was a misreading for *poenalis*.

<sup>10</sup> Sherrington's Case, Savile 40; see 3 STREET, FOUNDATION OF LEGAL LIABILITY, 70; see also opinion of Bowen, L. J., in Finlay v. Chirney, 20 Q. B. D. 494; POLLOCK, TORTS, 9 ed., 73, 74; SALMOND, TORTS, 2 ed., 66.

<sup>11</sup> See Hamblly v. Trott, 1 Cowp. 370; Phillips v. Homfray, 24 Ch. D. 439.

<sup>12</sup> See Pitts v. Hale, 3 Mass. 321; Barnard v. Harrington, 3 Mass. 228; 3 STREET, FOUNDATION OF LEGAL LIABILITY, 222.

<sup>13</sup> The maxim *actio personalis moritur cum persona* would therefore seem to be a re-statement of the old notion that, in the case of obligations incurred during life, death of the obligor required positive law to revive them. See LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION, 4 HARV. L. REV. 99.

<sup>14</sup> The technical nature of the distinction is shown by a modern case allowing a passenger to recover for injuries in a contract action, although the right to sue in tort had abated. Bradshaw v. Lancashire & Yorkshire R. Co., L. R. 10 C. P. 189.



character of the obligation is concerned, no substantial difference can be found between the right to compensation for the wrongful breach of a self-imposed contract duty, and the wrongful breach of a duty imposed by law not to commit a tort. The consequent unfairness of preferring a volunteer distributee over an injured party who may have been materially impoverished by the tort is obvious.<sup>15</sup>

The court distinguishes the principal case because the wrongdoer died before the plaintiff was injured. The reasoning seems to be that, where the deceased may project his personality after death sufficiently to commit a *post mortem* tort, justice requires a corresponding extension to make the estate liable. The argument is re-enforced by the fact that the estate of the deceased, as administered to-day, partakes of many of the features of an entity continuing the personality of the deceased. The result, however desirable, seems hard to support on common-law principles as historically developed. If no tort is committed till after death, there is then no tortfeasor to punish. Since the common law conceives of death as extinguishing pre-existing tort liability, *a fortiori* the impossibility of affixing a subsequently arising liability would seem to follow. And if the wrong occurred during the tortfeasor's life, the cause of action falls within none of the anomalous common-law exceptions which survive.<sup>16</sup>

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ENJOINING CRIMINAL PROSECUTIONS AGAINST THIRD PARTIES. — It is clear that there are certain property interests for harm to which the law gives a remedy under some circumstances, while under other circumstances no remedy is given for reasons of policy in that it would unduly limit general freedom of action. These are surely interests recognized as rights by the law and under its protection. For equity to give a remedy for infringement of such legal rights would be, therefore, an exercise of concurrent jurisdiction as opposed to exclusive jurisdiction where equity protects interests not recognized by the law, as for example the interest of a *cestui*. It is submitted that equity has jurisdiction to give a remedy for infringement of such legal rights where the law gives no remedy, as well as where the law grants merely an inadequate one, and that it may exercise it if the reasons of policy preventing a legal remedy would not apply to an equitable one.

For example, suppose that a life tenant, without impeachment of waste, tears down buildings. The law gives no remedy to the remainderman for the injury to his interest, but equity will grant him an injunction.<sup>1</sup> Yet the remainderman's interest is legal, and he has a legal right to have it unimpaired. This is shown by the fact that he could sue an outsider for a trespass which injured it.<sup>2</sup> The truth must be,

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<sup>15</sup> See discussion, see SALMOND, *TORTS*, 2 ed., 65.

<sup>16</sup> That the gravamen of the wrong is injury to the feelings seems to be considered a special ground for the abatement of the cause of action. Thus recovery was denied in a suit for breach of promise although the action is closely akin to contract. *Finlay v. Chirney*, 20 Q. B. D. 494.

<sup>1</sup> *Vane v. Barnard*, 2 Vern. 738; *Rolt v. Somerville*, 2 Eq. Cas. Abr. 759, pl. 8; *Aston v. Aston*, 1 Ves. 264.

<sup>2</sup> *Shortle v. Terre Haute, etc. R. Co.*, 131 Ind. 338, 30 N. E. 1084.

therefore, that, while the law recognizes the interest, it refuses to protect it in the particular circumstance because of some policy peculiar to its forum, — in this instance because the law sticks to the form of the words “without impeachment of waste,” and refuses to recognize that they were inserted merely to protect the life tenant against a forfeiture of his estate and not to permit him to injure wantonly the estate of another.<sup>3</sup> Another instance of this jurisdiction is where equity removes clouds upon title. For in most jurisdictions the ground of relief is not that equity is enabling the defendant to defend himself in the equitable forum because his legal defense is inadequate. It is that equity is affirmatively protecting the *jus disponendi* of property from injuries for which the law affords no remedy whatsoever.<sup>4</sup>

An analogous situation existed in a recent case in which, however, equity refused to act. Because of threatened criminal prosecutions under a statute alleged to be unconstitutional, customers of the plaintiff, a dairy company, were deterred from shipping to it, and the railroad was afraid to accept any such shipment. Although the plaintiff had no way to test its rights at law, and its business was being destroyed, equity refused to enjoin the prosecutions. *Milton Dairy Co. v. Great Northern R. Co.*, 144 N. W. 764 (Minn.). Since the plaintiff sought to work out his remedy *via* an injunction against the prosecutions, two questions are involved: first, whether equity has jurisdiction, and second, whether it will exercise it by enjoining a criminal prosecution.<sup>5</sup> So far as the latter question is concerned, this would seem to be one of the exceptional cases where equity might grant such a remedy, since the question is entirely one of law, thus meeting the objection that the parties have a right to a jury trial; and irreparable damage to property is threatened if equity does not act.<sup>6</sup> The main question is whether the injury to the plaintiff's interest is one which equity has jurisdiction to redress. The interest for which protection is asked is a business, or, in general, trade relations. This is a legal interest<sup>7</sup> and therefore if equity acts it will be exercising its concurrent jurisdiction. Now in the exercise of its con-

<sup>3</sup> LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION, 13 HARV. L. REV. 671.

<sup>4</sup> *Gage v. Rohrback*, 56 Ill. 262; *Gage v. Billings*, 56 Ill. 268; *Sullivan v. Finnegan*, 101 Mass. 447; *Clouston v. Shearer*, 99 Mass. 209.

<sup>5</sup> It is commonly said that equity will not enjoin a criminal prosecution. 1 HIGH ON INJUNCTIONS, 4 ed., § 68; see 23 HARV. L. REV., 469; *In re Sawyer*, 124 U. S. 200, 210, 211; *Predigested Food Co. v. McNeal*, 1 Oh. N. P. 266. It is also said equity will not enjoin the commission of a crime. Both these statements are true, broadly speaking, since equity has no jurisdiction to enjoin either a crime or a criminal prosecution as such, but if an incidental injury to property appears, the lack of jurisdiction is remedied. *Clark v. Breeders' Ass'n*, 85 Atl. (Md.) 503.

<sup>6</sup> An injunction will be granted: (a) where the matter has already been adjudicated at law in a suit between the same parties, *Block v. Crockett*, 61 W. Va. 421, 56 S. E. 826; (b) where the main question is one of law and equity has jurisdiction because of multiplicity of suits, *City of Chicago v. Collins*, 175 Ill. 445, 51 N. E. 987; or irreparable injury to property is threatened, *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613; (c) where the prosecutions are in an inferior court from which there is no appeal, *Shinkle v. City of Covington*, 83 Ky. 420. These situations all present aspects of the inadequacy of the remedy at law.

<sup>7</sup> *Casey v. Cincinnati Typo. Union No. 3*, 45 Fed. 135; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Tarleton v. McGauley*, 1 Peake, 270.



current jurisdiction, the rule of equity is to follow the law. This means that in general it protects those rights for which a remedy is given by the law. In the principal case, however, though the law gives a remedy for such damage when caused by other means, it gives none when caused by a prosecution.<sup>8</sup> But a prosecution under an unconstitutional statute is, loosely speaking, a wrong, since on theory an unconstitutional statute does not exist and furnishes no justification for acts done under its apparent authority.<sup>9</sup> The policy of the law in favor of fearless prosecution of criminals and safe and easy recourse to tribunals of justice has confined legal remedies for baseless suits within the strict limits of the action of malicious prosecution. But equity may act preventively in this instance without violating this policy of the law at all. Therefore, as the interest which is threatened is one which under many circumstances equity protects,<sup>10</sup> it is submitted that an injunction should not be denied merely because a policy necessitated by the peculiar legal situation prevents the injury in this instance from being a technical tort.<sup>11</sup>

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VOLUNTARY AND INVOLUNTARY SALES OF GOOD WILL. — "A person, not a lawyer, would not imagine that when the good will and trade of a retail shop were sold, the vendor might the next day set up a shop within a few doors and draw off all the customers."<sup>1</sup> Nevertheless, in the absence of express stipulations to the contrary, this is permitted by the great weight of authority.<sup>2</sup> What then is the good will which is sold? Good will may be said to be that advantage which is inherent in an established business over and above the actual property employed. It includes "the probability that the old customers will resort to the old place,"<sup>3</sup> and the advantages from custom or business connection,<sup>4</sup> em-

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<sup>8</sup> *Smith v. Adams*, 27 Tex. 28.

<sup>9</sup> *Dodge v. Woolsey*, 6 McLean (U. S.) 142, Fed. Cases 18,033; *Osborn v. Bank*, 9 Wheat. (U. S.) 738; *Southern Express Co. v. Rose*, 124 Ga. 581, 53 S. E. 185.

<sup>10</sup> 1 HIGH ON INJUNCTIONS, 4 ed., § 1415e; *Barr v. Essex Trades Council*, *supra*; *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 41 S. E. 553; *Hawardon v. Youghioghenny & Lehigh Coal Co.*, 11 Wis. 545, 87 N. W. 472.

<sup>11</sup> It is often said that one cannot enjoin a suit to which he is not a party. *New York v. Conn.*, 4 Dall. (U. S.) 1. But on many occasions such injunctions have been issued. In *McCullough v. Absecom Co.*, 10 Atl. (N. J.) 606, the petitioner in a suit to quiet title was allowed to enjoin a partition suit pending as to the same land. In *Fisher v. Lord*, 9 Fed. Cases 4,821, petitioner was allowed to enjoin a suit on a note he claimed to own. In *In re Walker*, 123 Pa. 381, petitioner was allowed to enjoin a suit to enforce a title to stock which he claimed to own. In *Sumner v. Marcy*, 3 Woodb. & M. (Fed.) 105, a stockholder was allowed to enjoin a judgment against the corporation which would subject him to a statutory liability.

<sup>1</sup> *Plumer, V. C.*, in *Harrison v. Gardner*, 2 Madd. 198, 219.

<sup>2</sup> *Cruttwell v. Lye*, 17 Ves. 335; *In re David* (1899), 1 Ch. 378; *Basset v. Percival*, 5 Allen (Mass.) 345; *Smith v. Gibbs*, 44 N. H. 335; *Von Bremen v. MacMonnies*, 200 N. Y. 41, 93 N. E. 186; *White v. Trowbridge*, 216 Pa. St. 11, 64 Atl. 862; *Zanturjian v. Boornazian*, 25 R. I. 151, 55 Atl. 199. See *HOPKINS, UNFAIR TRADE*, § 84; 1 *COLLYER, PARTNERSHIP*, 6 ed., 571.

<sup>3</sup> *Lord Eldon v. Cruttwell v. Lye*, *supra*, p. 346.

<sup>4</sup> See *Trego v. Hunt*, [1896] A. C. 7, 19; *STORY, PARTNERSHIP*, § 99; *ALLEN, GOOD WILL*, 8.

bracing trade marks and trade names.<sup>5</sup> In this sense good will is property and is assignable.<sup>6</sup> Good will also refers to the reputation and the friendliness of the public enjoyed by the particular man himself. This is by nature unassignable. The vendee can partially get the advantage of it if by contract he induces the vendor to endeavor to create by recommendation a new friendliness toward him on the part of the public. In the absence of this sort of agreement it is obviously to the advantage of the assignee that this personal good will of the vendor be removed from the field of competition. But the vendor is free to re-enter the trade unless there can be found some personal obligation, either express or implied from the transaction, not to compete. For if it is clear that there is no such personal obligation, the vendor, having given up all connection with the property, becomes justified like a third party<sup>7</sup> in interfering by competition.<sup>8</sup> So in a forced dissolution of a partnership or a sale by a trustee in bankruptcy, where there can be merely a sale of the property and no further personal obligations, the vendor is properly allowed to re-enter business. The early cases were of this sort;<sup>9</sup> but no distinction was taken later in the case of voluntary sales,<sup>10</sup> although, on analogy to warranties,<sup>11</sup> a contract obligation incidental to the transfer might well have been implied from the natural imputation of the vendor's retirement.<sup>12</sup> With the exception of a few desultory cases,<sup>13</sup> the Massachusetts courts have been alone in thus implying an obligation not to enter and compete in the same trade.<sup>14</sup>

<sup>5</sup> *Hudson v. Osborne*, 39 L. J. Ch. 79; *Levy v. Walker*, 10 Ch. D. 436; *Merry v. Hoopes*, 111 N. Y. 415.

<sup>6</sup> The assignment of a business takes this property good will with it without express reference.

<sup>7</sup> *Snowden v. Noah*, 1 Hopk. Ch. (N. Y.) 347.

<sup>8</sup> The vendor may not resort to unfair competition such as claiming to be the successor of the business he has sold, *Hall's Appeal*, 60 Pa. St. 458; *Cottrell v. Babcock*, 54 Conn. 122, 6 Atl. 791; *Hookham v. Pottage*, L. R. 8 Ch. 91; or using his name in such a manner as to deceive, *Churton v. Douglas*, *Johnson*, 174; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 20 N. W. 545. But in the absence of unfairness he may use his own name. *Ranft v. Reimers*, 200 Ill. 386, 65 N. E. 720; *White v. Trowbridge*, *supra*; *LINDLEY, PARTNERSHIP*, 8 ed., 509.

<sup>9</sup> *Cruttwell v. Lye*, *supra*; *Cook v. Collingridge*, 27 Beav. 456; *Hall v. Barrows*, 4 DeG. J. & S. 150; *Dayton v. Wilkes*, 17 How. Pr. (N. Y.) 510. This was fair to the purchaser, as he was given notice in fixing the price that the former owner could compete. *Cook v. Collingridge*, *supra*; *Hall v. Barrows*, *supra*.

<sup>10</sup> See cases in Note 2, *supra*.

<sup>11</sup> See *Dwight v. Hamilton*, 113 Mass. 175, 177. Even where there is an express warranty of good will, however, the vendor is allowed to start business again. *Costello v. Eddy*, 12 N. Y. Supp. 236.

<sup>12</sup> See *Trego v. Hunt*, *supra*, pp. 19, 24; *Hutchinson v. Nay*, 187 Mass. 262, 72 N. E. 974. Unlimited restraint of trade has been advanced *ex post facto* as a reason for not implying a covenant not to compete. *Trego v. Hunt*, *supra*, pp. 27, 29. But where an express covenant not to re-enter business is too broad to be entirely enforceable, it is nevertheless held valid within reasonable limits. *Althen v. Vreeland*, 36 Atl. 479 (N. J.). As an implied covenant could be treated in the same way, there is no weight to this objection.

<sup>13</sup> *Wentzell v. Barbin*, 189 Pa. St. 502, 42 Atl. 44; *Brown v. Benziger*, 118 Md. 29, 84 Atl. 79. See *Townsend v. Hurst*, 37 Miss. 679; *Yeakley v. Gaston*, 111 S. W. 768 (Tex. Civ. App.).

<sup>14</sup> *Dwight v. Hamilton*, *supra*; *Munsey v. Butterfield*, 133 Mass. 492; *Old Corner Book Store v. Upham*, 194 Mass. 101, 80 N. E. 228; *Foss v. Roby*, 195 Mass. 292, 81 N. E. 199; *Gordon v. Knott*, 199 Mass. 173, 85 N. E. 184; *Marshall Engine Co. v.*



A limitation to the acknowledged right to competition was laid down by Lord Romilly. Admitting that a vendor after a sale of good will may solicit business generally by advertisement,<sup>15</sup> he decided that a voluntary sale of good will implied a promise not to solicit the old customers directly.<sup>16</sup> This case gave rise to a variety of opinions in England<sup>17</sup> and was overruled,<sup>18</sup> but finally the English law was again settled in accord with Lord Romilly.<sup>19</sup> In the meantime some American authority had followed the contrary case,<sup>20</sup> but the better authority now so restricts a voluntary vendor.<sup>21</sup> It would seem that the reasons underlying the implication of a promise not to solicit old customers would logically cover a promise not to compete in other ways. But because the courts, except Massachusetts, were previously bound to the wrong rule as to re-entering business, seems no reason for sacrificing justice in a situation where the question raised was *res integra*.

The courts which have thus denied the right of solicitation after a voluntary sale have nevertheless allowed the vendor free rein after an involuntary sale.<sup>22</sup> The policy of the Bankruptcy statute has been given as the reason.<sup>23</sup> As some of the cases, however, are of forced sales other than in bankruptcy, the true reason must be that the courts recognize that there can be no implied promise of any kind when the sale is involuntary or when the vendor is not a contracting party.

An interesting case came up in England, where good will was sold by the assignee of a voluntary assignment for the benefit of creditors. It was held that the assignor might again solicit his former customers. *Green & Sons v. Morris*, Weekly Notes 65 (Ch. Div., Feb. 6, 1914). While the courts sometimes have gone rather far in implying an obliga-

New Marshall Engine Co., 203 Mass. 410, 89 N. E. 548. But see *Fairfield v. Lowry*, 207 Mass. 352, 93 N. E. 598.

<sup>15</sup> *Cruttwell v. Lye*, *supra*.

<sup>16</sup> *Labouchere v. Dawson*, L. R. 13 Eq. 322.

<sup>17</sup> *Ginesi v. Cooper*, 14 Ch. D. 596; *Leggott v. Barrett*, 15 Ch. D. 306; *Mogford v. Courtenay*, 45 L. T. R. 303.

<sup>18</sup> *Pearson v. Pearson*, 27 Ch. D. 145.

<sup>19</sup> *Trego v. Hunt*, *supra*. This rule extends even to soliciting those who have voluntarily come back. *Curl Bros. v. Webster*, [1904] 1 Ch. 685. There is much talk in the books that the vendor cannot solicit because it would be "derogating from his grant." This reasoning is circular, for the question at issue is: what has been granted?

<sup>20</sup> *Cottrell v. Babcock*, *supra*; *Williams v. Farrand*, 88 Mich. 473, 50 N. W. 446; *Marcus Ward & Co. v. Ward*, 15 N. Y. Supp. 913. Other American decisions allowing the vendor to solicit but not depending directly on *Pearson v. Pearson*, *supra*, are *Bergamini v. Bastian*, 35 La. Ann. 60; *MacMartin v. Stevens*, 37 Wash. 616, 79 Pac. 1099. Where the contract expressly allowed the vendor to re-enter business at the end of a certain period, the right to solicit has been implied. *Hanna v. Andrews*, 50 Ia. 462; *Armstrong v. Bitner*, 71 Md. 118, 17 Atl. 1054, 20 Atl. 136.

<sup>21</sup> *Ranft v. Reimers*, *supra*; *Brown v. Benziger*, *supra*; *Gordon v. Knott*, *supra*; *Snyder Pasteurized Milk Co. v. Burton*, 80 N. J. Eq. 185, 83 Atl. 907; *Von Bremen v. MacMonnies*, *supra*; *Zanturjian v. Boornazian*, *supra*. Likewise the vendor cannot solicit the return of his old employees, *Acker, Merrill & Condit Co. v. McGaw*, 144 Fed. 864, nor obtain his former telephone, *Ranft v. Reimers*, *supra*; *Brown v. Benziger*, *supra*.

<sup>22</sup> *Walker v. Mottram*, 19 Ch. D. 355; *Dawson v. Beeson*, 22 Ch. D. 504; *Hutchinson v. Nay*, *supra*; *Griffith v. Kirley*, 189 Mass. 522, 76 N. E. 201; *Kates v. Bok*, 124 N. Y. Supp. 297.

<sup>23</sup> See *Walker v. Mottram*, *supra*, p. 364.

tion on the vendor in what were apparently forced sales,<sup>24</sup> an assignment for the benefit of creditors would seem clearly to raise no implication that the vendor would not later hold himself free to exercise full rights of competition. So the recent case seems correct.

APPLICATION OF THE RULE IN ARCHER'S CASE IN AMERICA. — At common law under the English system of primogeniture there could be only one *heir* existing at any given time.<sup>1</sup> Consequently, when the plural word *heirs* was used in conveyancing, it could only refer to a chain of inheritable succession from a progenitor and could not mean a coexisting class of individuals answering to the description of heirs. *Heirs* came to be the technical word used to limit an estate of inheritance which would follow through the entire structure of descent from the progenitor.<sup>2</sup> Hence, when the situation, illustrated in Shelley's Case,<sup>3</sup> arose, where in the same instrument a remainder was limited to the *heirs* or *heirs of the body* of the donee or grantee of the prior life estate, it was not surprising that the courts, clinging to the technical meaning of the word *heirs*, found an attempt to pass the remainder as if an inheritance from the holder of the life estate.<sup>4</sup> The words were words of limitation, or outline of a structure of descent from the progenitor named, the form alone that of purchase. The remainder was, therefore, read as a fee or fee tail in the ancestor, into which the life estate might merge.<sup>5</sup> Since then the English cases have consistently given effect to the technical meaning of the plural word *heirs* or *heirs of the body* by refusing to consider context inconsistent with the technical legal import.<sup>6</sup>

When the singular word *heir* was used, however, the situation has been different.<sup>7</sup> It could denote a line of descent, if used collectively, or a particular individual, if used singly. With no restrictive context it was

<sup>24</sup> *Jennings v. Jennings*, [1898] 1 Ch. 378; *in re David*, *supra*; *Von Bremen v. MacMonnies*, *supra*.

<sup>1</sup> See FEARNE, C. R., 10 ed., pp. 181-185; CHALLIS, REAL PROPERTY, 3 ed., p. 221; 14 L. QUART. REV. 98; *Burnett v. Coby*, 1 Barn. 367; *Doe v. Harvey*, B. & C. 610; *Jesson v. Wright*, 2 Bligh 1, at p. 53.

<sup>2</sup> See 1 Coke, 104 b; 29 L. R. A. N. S. pp. 1039-1065. Cf. CHALLIS, REAL PROPERTY, 238, 242, 166; and note an exceptional case, *Mandeville's Case*, Coke Litt. 266.

<sup>3</sup> 1 Coke, 93 b; reprinted in CHALLIS, REAL PROPERTY, 154; 29 L. R. A. N. S. 968.

<sup>4</sup> Cf. 29 L. R. A. N. S. 1006-1007.

<sup>5</sup> See 1 TIFFANY, REAL PROPERTY, § 130; 1 HAYES, CONVEYANCES, 5 ed., 542-546; *Van Grutten v. Foxwell*, [1897] A. C. 658, 668.

<sup>6</sup> *Wright v. Pierson*, 1 Eden 110; *Measure v. Gee*, 5 B. & Ald. 910; *Jesson v. Wright*, 2 Bligh 1; *Doe v. Harvey*, 4 B. & C. 610; *Mills v. Seward*, 1 J. & H. 733; *Jordan v. Adams*, 9 C. B. N. S. 483; *Van Grutten v. Foxwell*, [1897] A. C. 658. Decisions seemingly *contra* have invariably been in cases of wills, where the word *heirs* has clearly been used loosely in a non-technical sense as the equivalent of *children* and the like. See *Doe v. Lanning*, 2 Burr. 1100; *Crump v. Wooley*, 7 Taunt. 362; *Doe v. Goff*, 11 East 668; *Bull v. Comberbach*, 25 Beav. 540; *Right v. Creber*, 5 B. & C. 866. Cf. *Measure v. Gee*, 5 B. & Ald. 910. In *Doe v. Goff*, *supra*, Lord Ellenborough said at pp. 671-672: "And the words which follow put it past all doubt that the testator used the words 'heirs of the body' not as words of limitation . . . but as equivalent to *children* or *issue of her body*. . . ." See 1 FEARNE, C. R. 186-197; 1 TIFFANY, REAL PROPERTY, § 132; 10 HARV. L. REV. 66.

<sup>7</sup> See 1 FEARNE, C. R. 150, 178; CHALLIS, REAL PROPERTY, 230; 29 L. R. A. N. S. 1017.



interpreted collectively and Shelley's rule was applied.<sup>8</sup> When used with words clearly inconsistent with the collective sense, it was construed, as in Archer's Case, to designate an individual purchaser.<sup>9</sup>

In America primogeniture has been generally abolished.<sup>10</sup> More than one heir therefore may be in existence at any one time. The plural word *heirs* is not only descriptive of a line of descent, as in England, but may also designate a number of individuals who take as tenants in common. On this ground a recent federal case from Illinois presents the proposition that in America the *heirs of the body* ought to have the same possibilities of construction as the singular form in England.<sup>11</sup> There a deed read, in substance, to Sarah for life and at her death "to the heirs of the body of Sarah, their heirs and assigns." The court followed Archer's Case, and thus construed the deed to give a life estate to Sarah and a contingent fee to the class as tenants in common who should come within the description "heirs of the body" at the death of Sarah.<sup>12</sup> *Etna Life Ins. Co. v. Hoppin* (C. C. A., 7th Circ. Not yet reported).

The proposition is sound unless to-day the word *heirs* (plural), because of the peculiar effect given the plural word in England, has come to imply a stronger idea of inheritance from a progenitor than the singular *heir*. Many courts in America have applied the rule in Shelley's Case to situations very similar to that disclosed in the recent decision.<sup>13</sup> On the other hand, many courts have refused to apply the rule, but they have usually based their decisions on the erroneous ground that the intention of the testator to give the first taker only a life estate made the rule inapplicable.<sup>14</sup> In one former case, however, the difference, dis-

<sup>8</sup> *Richards v. Bergavenny*, 2 Vern. 324. See the discussion of the rule in *Evans v. Evans*, [1892] 2 Ch. 173. Cf. *Fuller v. Chamier*, L. R. 2 Eq. 682.

<sup>9</sup> Archer's Case, 1 Coke, 66 b, discussed in 1 FEARNE, C. R., 10 ed., 150, 193. In this case the devise read to Robert for life and afterwards to the next *heir* male of Robert and the *heirs* male of the body of such next *heir* male. The court considered that the reference to heir, in the singular, with the superadded words of limitation, to be a specific description of the person who should be "next heir male" as to donee of a fee tail by purchase. So the rule in Shelley's Case did not apply. *Willis v. Hiscox*, 4 Myl. & Cr. 197; *Chamberlayne v. Chamberlayne*, 6 El. & Bl. 625; *Greaves v. Simpson*, 10 L. T. 448. Archer's Case is distinguished in *Minshull v. Minshull*, 1 Atk. 410, 413; *Sayer v. Masterman*, 1 Ambl. 344, 346; *Featherston v. Featherston*, 3 Cl. & F. 67; *Johnson v. Rutherford*, 3 L. T. 649, 650. Cf. *White v. Collins*, Comyn 289.

In like manner non-technical words such as "issue" or "person or persons who shall be heirs at the death of the life tenant" have been construed as an individual person or class. *Lodington v. Kime*, 1 Salk. 224 (issue); *Bowles' Case*, 11 Co. 79 b (issue); *Bannester v. Lang*, 17 L. T. N. S. 137 (issue); *Evans v. Evans*, [1892] 2 Ch. 173 (persons).

<sup>10</sup> ILL. STATUTES, 4202. See *Meadowcroft v. County*, 181 Ill. 504; 1 STIMSON, AM. ST. LAW, 3101, 3107, 3113, 3121, 3134.

<sup>11</sup> See also in lower court, 249 Ill. 406.

<sup>12</sup> The same result could be reached by applying the rule in Shelley's Case, obtaining a fee tail, and then applying the Statute of Entails in Illinois but for the settled construction that the Statute of Entails gives a vested remainder in the children of the life tenant when born. See *Winchell v. Winchell*, 259 Ill. 471, 102 N. E. 823; *Moore v. Riddell*, 259 Ill. 36, 102 N. E. 257; ILLINOIS CONVEYANCING ACT, ch. 30, § 6. See 6 ILL. L. REV. 270; 8 ILL. L. REV. 313; and cf. with *In re Kelso*, 69 Vt. 272; *Horsley v. Hilburn*, 44 Ark. 458.

<sup>13</sup> *Baughman v. Baughman*, 2 Yeates (Pa.) 410; *Hileman v. Bruslaugh*, 13 Pa. 251; *Hardage v. Stroope*, 58 Ark. 303, 24 S. W. 490; *Brown v. Lyon*, 6 N. Y. 419; *Darmer v. Trescott*, 5 Rich. Eq. (s. c.) 356.

<sup>14</sup> *De Vaughn v. Hutchinson*, 165 U. S. 566; *Earnhart v. Earnhart*, 127 Ind. 397;

cussed above, between the English and the American law of inheritance has been used as a ground for not applying the rule in Shelley's Case.<sup>15</sup> Such construction, whether advisable or not, is at least possible in America, and certainly affords a basis for distinguishing and reconciling the results of the English and American cases.

As a general proposition, technical meanings for formulas of conveying are desirable in order to secure stability of titles.<sup>16</sup> Since the main reasons urged for the adoption of the proposition of the case are simply arguments for abolishing the rule in Shelley's Case altogether,<sup>17</sup> a better result would be gained by legislation than by forced construction by way of exception.

CONSTITUTIONALITY OF THE FEDERAL YACHT TAX. — The Supreme Court has declared the power to tax to rest upon the reciprocal duties of protection and support between the state and the citizen.<sup>1</sup> When the constitutionality of a certain tax is questioned, the basic inquiry becomes whether the taxing power is rendering a *quid* of protection for the *quo* which it receives, in the shape of the tax, from the taxed object.<sup>2</sup> Obviously a state may tax all the property within its borders.<sup>3</sup> A like power extends to all persons domiciled therein.<sup>4</sup> While a poll tax is the simplest method of personal taxation,<sup>5</sup> taxes are more often imposed in proportion to wealth and power.

Is it due process of law to include property outside of a state or of the United States in estimating this wealth and power? Even in our common-law conception of territorial sovereignty, it may be said that the benefits conferred by the state government do not stop at the borders. The law of the state of domicile determines legitimacy,<sup>6</sup> the devolution of property at death,<sup>7</sup> the right to act as a corporation,<sup>8</sup> all of which are effective beyond the state line. State law confers property rights given effect to everywhere.<sup>9</sup> It must be recognized, however, that in the end the benefit depends upon the foreign state or federal govern-

Westcott v. Meeker, 144 Ia. 311, 122 N. W. 964, criticized in 23 HARV. L. REV. 313; State ex rel. Farley v. Welsh, 162 S. W. (Kan.) 637; Hamilton v. Wentworth, 58 Me. 101; Carnedy v. Haskins, 54 Mass. 389; Peer v. Hennion, 77 N. J. L. 693; Lemacks v. Glover, 1 Rich. Eq. (S. C.) 141. It is to be noted that these are all cases of wills where greater scope in construction is usually allowed. 1 TIFFANY, REAL PROPERTY, § 132; 29 L. R. A. N. S. 1038.

<sup>15</sup> Tucker v. Adams, 14 Ga. 548; 28 L. QUART. REV. 148.

<sup>16</sup> See 1 FEARNE, C. R. 201; 12 HARV. L. REV. 64.

<sup>17</sup> A list of the states which have abolished the rule in Shelley's Case will be found in 1 STIMSON, AM. ST. LAW, § 1406.

<sup>1</sup> Union Transit Co. v. Ky., 199 U. S. 194, 202, 204; State Tax on Foreign-Held Bonds, 15 Wall. [U. S.] 300, 302. "The theory of all taxation is that taxes are imposed as a compensation for something received by the taxpayer." Dalrymple v. Milwaukee, 53 Wis. 178, 185.

<sup>2</sup> GRAY, CONSTITUTIONAL LIMITATIONS ON THE TAXING POWER, § 168 a.

<sup>3</sup> GRAY, CONSTITUTIONAL LIMITATIONS ON THE TAXING POWER, §§ 72, 73.

<sup>4</sup> JUDSON ON TAXATION, §§ 414, 415.

<sup>5</sup> COOLEY ON TAXATION, 3 ed., 28.

<sup>6</sup> Scott v. Key, 11 La. Ann. 232.

<sup>7</sup> Lawrence v. Kitteridge, 21 Conn. 576.

<sup>8</sup> Bank of Augusta v. Earle, 13 Pet. (U. S.) 519.

<sup>9</sup> Green v. Van Buskirk, 7 Wall. (U. S.) 139.



ment because it is according to the will of such state as expressed by its law that the right is recognized, or because the recognition is made obligatory by force of the Constitution. Upon state citizenship depends the right to sue in the federal courts,<sup>10</sup> and only to state citizens does the privileges and immunities clause of the Constitution apply,<sup>11</sup> but here also it may be said that the right itself is secured by the federal power. At any rate, these benefits have not been considered sufficient to permit a state to include property beyond the jurisdiction in assessing a personal tax. Foreign realty, or any interest therein, must be excluded to comply with due process of law.<sup>12</sup> Tangible personalty outside the state, it is said, receives no protection and cannot be included.<sup>13</sup> The same rule, on principle, would seem applicable to a tangible chose in action, which is taxable at its *situs*.<sup>14</sup> Tangible personalty which has acquired no taxable *situs* elsewhere<sup>15</sup> and choses in action<sup>16</sup> may be included in a tax upon the owner at his domicile. This exception is justified by practical necessity and old custom; and it is only here that the misleading maxim *mobilia sequuntur personam* may be argued to have some application.

In deciding the constitutionality of the federal yacht tax, however, the Supreme Court held that the due process clause of the Fifth Amendment is not violated when tangible personalty with a foreign *situs*, in this case a yacht, is made the basis of a tax by the federal government upon a domiciled citizen. *United States v. Bennett*, 34 Sup. Ct. 433. The court, while recognizing the restrictions upon the state's powers, held these not applicable to the federal government. Its benefits, it is said, extend beyond the territorial confines of the nation. It is true that the federal government procures recognition and protection for its citizens and their property abroad by treaties, but it may be argued that so also by agreement with the other states through the Constitution, each state has really procured similar benefits for its citizens in the several states. The federal government, however, spends huge sums on army and navy, ambassadors and consuls for the enforcement of these international rights, while on the state there is no such burden, since interstate enforcement of rights is delegated to the federal power, which again pays the expense. Furthermore, in the case of a yacht owned by an American citizen although in foreign waters, the admiralty jurisdiction of the federal government would apply. These differences would seem to justify the larger scope of federal taxation. If this analysis is sound, the economic undesirability of the result — taxing the same amount of wealth twice — is for the consideration of the legislature, not the court.<sup>17</sup>

<sup>10</sup> CONSTITUTION OF THE UNITED STATES, Art. III, § 2.

<sup>11</sup> CONSTITUTION OF THE UNITED STATES, Art. IV, § 2.

<sup>12</sup> *Louisville Ferry Co. v. Ky.*, 188 U. S. 385. GRAY, CONSTITUTIONAL LIMITATIONS ON THE TAXING POWER, § 168 a.

<sup>13</sup> *Union Transit Co. v. Ky.* 199 U. S. 194. This practice was common before this decision, and, while questioned as a matter of policy, its legality did not seem to be doubted. See BEALE, FOREIGN CORPORATIONS, § 483, JUDSON ON TAXATION, § 420, COOLEY ON TAXATION, 3 ed., 86. See also 19 HARV. L. REV. 206.

<sup>14</sup> *New Orleans v. Stempel*, 175 U. S. 309.

<sup>15</sup> *New York Central R. Co. v. Miller*, 202 U. S. 584; *Southern Pac. Co. v. Ky.*, 222 U. S. 63.

<sup>16</sup> *Commonwealth v. Northwestern Ins. Co.*, 107 S. W. 233 (Ky.).

<sup>17</sup> COOLEY ON TAXATION, 3 ed., 9.

## RECENT CASES.

**ABATEMENT AND REVIVAL — SURVIVAL OF ACTION — TESTAMENTARY LIBEL.** — A testator, leaving a small bequest to his niece, described her in the will as the illegitimate child of his brother. *Held*, that the niece may recover against the estate of the deceased in an action of libel. *Harris v. Nashville Trust Co.*, 162 S. W. 584 (Tenn.).

For discussion of the question thus raised, see page 666 of this issue.

**ACCORD AND SATISFACTION — DISPUTED CLAIMS — RETENTION OF CHECK TENDERED AS PAYMENT IN FULL.** — The defendant disputed one item in the plaintiff's claim for goods manufactured, but admitted the others, and sent a check for the admitted amount less two per cent. The check was stamped "This pays in full." The plaintiff cashed the check and sues for the balance of the account. *Held*, that the defendant is liable. *Dunn v. Lippard-Stewart Motor Car Co.*, 144 N. Y. Supp. 349 (Sup. Ct.).

The plaintiff sold and delivered to the defendant goods to the amount of \$80.03. The defendant claimed the right to return part of these and sent a check for the price of the rest, stating that it was in full settlement of the account. The plaintiff refused to take the goods back, but cashed the check and sued for the balance of his claim. *Held*, that the defendant is liable. *Whittaker Chain Tread Co. v. Standard Auto Supply Co.*, 103 N. E. 695 (Mass.).

The plaintiffs leased an engine to the defendant. The defendant claimed a deduction from the rent because the engine was not in repair when leased, and sent a check for less than the amount of the rent in full settlement. The plaintiffs cashed the check and sued for the balance of his claim. *Held*, that the defendant is not liable. *Neubacher v. Perry*, 103 N. E. 805. (Ind. App. Ct.).

Where a check for less than the amount of a disputed or unliquidated claim is given on condition that it be accepted in full satisfaction, if the creditor cashes it, although protesting that it is in part payment only, the claim will be discharged, and the creditor will not be permitted to say that he has used the check in violation of the condition upon which it was given. *Nassoiv v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715; *Sparks v. Spaulding Mfg. Co.*, 139 N. W. (Ia.) 1083. *Contra*, *Thayer v. Harbican*, 70 Wash. 278, 126 Pac. 625; *Day v. McLea*, 22 Q. B. D. 610. See *Hirachand Punamchand v. Temple*, [1911] 2 K. B. 330, 340, 342. The New York and Massachusetts cases represent an attempt to get away from this strict rule, which has been criticized as working a hardship on creditors. See 18 HARV. L. REV. 617. The theory of the courts is, that where part of a claim is admitted, payment only of that which is admitted can furnish no consideration for the discharge of the remainder. *Siegele v. Des Moines Mutual Hail Insurance Association*, 28 S. D. 142, 132 N. W. 697; *Thayer v. Harbican*, *supra*. But if the claim is entire, the debtor is not under two obligations, one certain and one uncertain, but under a single uncertain obligation. Therefore, the distinction taken by the courts seems unsound. *Treat v. Price*, 47 Neb. 875, 66 N. W. 834; *Neely v. Thompson*, 68 Kan. 103, 75 Pac. 117; *contra*, *Weidner v. Standard Life, etc. Co.*, 130 Wis. 10, 110 N. W. 246. To protect the creditor, however, the general rule should only apply where there is a *bonâ fide* dispute and where the tender is made upon a clear and unequivocal condition. *Canadian Fish Co. v. McShane*, 80 Neb. 551, 114 N. W. 594; *N. B. Borden & Co. v. Vinegar Bend Lumber Co.*, 62 So. 245 (Ala. Ct. App.).

**BANKS AND BANKING — DEPOSITS — RIGHT TO APPLY DEPOSIT OF CONVERTED FUNDS TO ANTECEDENT DEBT OF DEPOSITOR.** — W. was accustomed to ship hogs to his agent to sell, with instructions to deposit the proceeds with



the defendant bank to be applied to a debt W. owed the bank. By mistake, a consignment belonging to the plaintiff was sent on in W.'s name. The hogs were sold, and the agent, in ignorance of the plaintiff's ownership, deposited the proceeds as usual in the defendant bank, which the latter immediately applied to W.'s debt. The plaintiff, learning of the mistake, sues the bank. *Held*, that the plaintiff may recover. *Wilson v. Farmers' First Nat. Bank*, 162 S. W. 1047 (Mo. Ct. App.).

On the sale of the hogs the agent held the proceeds in constructive trust for the plaintiff. See *Newton v. Porter*, 69 N. Y. 133, 140. When the agent, acting for the principal, deposited the funds, by the agency doctrine of identification it was the principal who deposited. Now where a trustee deposits trust funds in his own general account, the bank may apply the money to any existing debt of his if it takes without notice of the trust. *School District v. Bank*, 102 Mass. 174. *First Nat. Bank v. City Nat. Bank*, 102 Mo. App. 357, 76 S. W. 489. But for the bank to have the right to apply, the relation of bank and depositor, of debtor and creditor, must exist. *Mingus v. Bank of Ethel*, 136 Mo. App. 407, 117 S. W. 683. In the principal case the agency was never revoked. So it would seem that in making the deposit the agent acted within his express authority, thus establishing the relation. See STORY, AGENCY, 9 ed., § 470. But even if the agent had no authority to deposit the fund, as the court seems to believe, or if he had been a complete stranger to the parties, it is submitted that the bank should still be protected. A contract of deposit is virtually a contract for the benefit of a third party. *Hawley v. Exchange, etc. Bank*, 97 Ia. 187, 66 N. W. 152. Where that doctrine is strictly followed, a new obligation arises at once in favor of the third party, *i. e.*, the promisor becomes the latter's debtor. *Bay v. Williams*, 112 Ill. 91. The relation of debtor and creditor thus established between the bank and W., the bank's right to apply would seem complete. *First Nat. Bank v. City Nat. Bank, supra*. Of course, where the third party's assent is required to fix the liability (*Wood v. Moriarty*, 15 R. I. 518, 9 Atl. 427), it would seem that the right should only accrue where assent is given. Or if the third party later disclaims, the bank's defense on this ground is gone. *Mingus v. Bank, supra*. But even so, the bank might be protected (on the broader doctrine of *Price v. Neal*, as set forth by Dean Ames in 4 HARV. L. REV. 297). It took the deposit under the *bona fide* impression that it was to the account of the debtor and so could rightfully be applied to his antecedent debt. The legal title passed, and, as the equities were equal, it is submitted that the bank should be allowed to retain. The principal case would therefore seem wrong.

BILLS AND NOTES — CHECKS — TRAVELERS' CHECKS — LIABILITY OF ISSUING BANK WHEN COUNTER-SIGNATURE IS FORGED. — The defendant bank had issued to the plaintiff a traveler's check in the following form: "When countersigned below with the opposite signature Knauth et al. through their correspondents will pay against this check out of their balance to the order of," etc. The check having been stolen, forged and paid, the plaintiff sued to recover his deposit. It appeared that there would have been ample time for the defendant bank to have prevented payment of the check had it been promptly notified of the loss. *Held*, that the plaintiff can recover. *Sullivan v. Knauth*, 50 N. Y. L. J. 2821 (N. Y. App. Div., March, 1914).

No previous case can be found which squarely involves travelers' checks. Cf. *Samberg v. Am. Express Co.*, 136 Mich. 639. It is submitted that in form this check represents a certification or acceptance in advance, which becomes effective by the addition of the drawer's counter-signature. When such a check is lost the likelihood of forgery is great, because it carries on its face a facsimile of the drawer's signature. On the other hand, payment at the direction of the forger could frequently be prevented by prompt notice to the issuing bank.

Therefore, it seems not unreasonable to bar the holder if his failure to make known his loss has been a proximate cause in the payment on the forgery. It has been held that an ordinary bank depositor whose signature has been forged may be barred by his negligence if he fails to give prompt notice of an error in his monthly statement. *Dana v. National Bank*, 132 Mass. 156. In the traveler's check the relation between the holder and the issuing bank, although not as close and continuous, is analogous to that of banker and depositor. The decision in the lower court was in accord with this view. 142 N. Y. Supp. 307.

**BILLS AND NOTES — STATUTES — NEGOTIABLE INSTRUMENTS LAW: EFFECT ON STATUTE MAKING GAMBLING NOTES VOID.** — A statute declared void all notes given for a gambling consideration. Sections 55 and 57 of the Negotiable Instruments Law, subsequently adopted, provide that the title of a person who negotiates an instrument is defective when obtained for an illegal consideration, and that a holder in due course holds the instrument free from any defect of title of prior parties, and from defenses available to prior parties among themselves. The plaintiff was a *bonâ fide* holder for value of a note given for a gambling consideration. *Held*, that the plaintiff cannot recover. *Martin v. Hess*, 71 Leg. Int. 148 (Munic. Ct. Phila., Feb. 25, 1914).

By the law merchant, illegality of consideration, although created by statute, is only an equitable defense. *Hopmeyer v. Frederick*, 74 Ill. App. 301. See *Sondheim v. Gilbert*, 117 Ind. 71, 76, 18 N. E. 687. But it is well settled that even a *bonâ fide* purchaser for value cannot recover, where a statute declares the instrument absolutely void. *Bowyer v. Bampton*, 2 Strange, 1155; *Unger v. Boas*, 13 Pa. 601. The principal case presents the question whether the Negotiable Instruments Law repeals the previous voiding statute, and makes the defense only personal. Since the uniform law provides that the title of one who obtains an instrument for illegal consideration is defective, and that a holder in due course takes free of defects of title of prior parties, it has been held that the former statute is repealed by necessary implication. *Wirt v. Stubblefield*, 17 App. Cas. (D. C.) 283; *Klar v. Kostniuk*, 65 N. Y. Misc. 199, 119 N. Y. Supp. 683. *Contra*, *Alexander v. Hazelrigg*, 123 Ky. 677, 97 S. W. 353. But this construction of the Negotiable Instruments Law, although it tends to promote the free circulation of negotiable paper, seems improper: for the gambling statute voids the instrument in its inception, and the case is properly not one of defective title, but rather one where no negotiable instrument has ever come into existence. The Negotiable Instruments Law therefore seems to have no application. See *Klar v. Kostniuk*, 65 N. Y. Misc. 199, 202, 119 N. Y. Supp. 683, 686; 59 U. OF PA. L. REV. 489. Moreover, in view of the strong policy in favor of the gambling statute, a repeal of it should be clear and unambiguous. *Alexander v. Hazelrigg*, *supra*. The decision of the principal case would therefore seem correct.

**CONFLICT OF LAWS — MAKING AND VALIDITY OF CONTRACTS — FORMAL VALIDITY: WHAT LAW GOVERNS.** — The plaintiff and the defendant contracted in Oklahoma for the sale of land in North Dakota. The plaintiff sued in Oklahoma for breach of the contract, and the defendant relied upon the North Dakota statute of frauds. *Held*, that the law of North Dakota governs. *Baird Investment Co. v. Harris*, 209 Fed. 291 (C. C. A., Eighth Circ.).

The formal, not the essential, validity of the contract is here involved. See article by Professor Beale, 23 HARV. L. REV. 1, 3. On principle, of course, both should be governed by the law of the place where the contract is made, since only the law that applies to the acts of the parties can annex to their promises an obligation of performance. See article by Professor Beale, 23 HARV. L. REV. 260, 270. But it is now too late to argue for the true doctrine as respects essential validity. Usually, however, it is correctly held that formal validity de-



pendes on the *lex loci contractus*, on the principle *locus regit actum*. *Hunt v. Jones*, 12 R. I. 265. See DICEY, *CONFLICT OF LAWS*, 2 ed., 540. This is the better view, even in contracts for the sale of land. See *Cochran v. Ward*, 5 Ind. App. 89, 93, 29 N. E. 795, 796; WHARTON, *CONFLICT OF LAWS*, 3 ed., § 693 b. Dicey, however, states that in such contracts<sup>1</sup> the *lex situs* governs as to formal validity. See DICEY, *CONFLICT OF LAWS*, 2 ed., 503, 542. The principal case in result supports this exception, for which there is some American authority. *Meylink v. Rhea*, 123 Ia. 310, 98 N. W. 779. See *Bissell v. Terry*, 69 Ill. 184, 190. Of course if the *lex situs* refuses to recognize that an interest in the land has been created by such a contract, relief *in rem* cannot be obtained. This, however, should not prevent relief *in personam* by way of damages such as was sought in the principal case. See 21 HARV. L. REV. 365.

CONTRACTS — RESTRAINT OF TRADE — VALIDITY OF RESTRICTIONS AGAINST COMPETITION IN EMPLOYMENT CONTRACT. — The defendant, on accepting employment in the plaintiff's pathological laboratory in London, agreed not to engage in any similar work within ten miles of the plaintiff's laboratory, no limit of time being expressed. The defendant later set up a rival laboratory within the ten-mile limit, and the plaintiff seeks to enjoin him. *Held*, that an injunction will not be granted. *Eastes v. Ross*, [1914] 1 Ch. 468.

If the restraint of trade imposed is reasonable with reference to the interests of the parties and the public, the contract will be upheld. *Maxim v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A. C. 535; *Oakdale Mfg. Co. v. Garst*, 18 R. L. 484, 28 Atl. 973. So an agreement, on the sale of good will, that the vendor, during his life, will not compete within a reasonable distance of his vendee, is valid. *Marshalls v. Leek*, 17 T. L. R. 26; *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 59 N. E. 357. If the object of a contract, with restrictions similar to those in the principal case, is to protect the employer's trade secrets, it will also be upheld. *Haynes v. Doman*, [1890] 2 Ch. 13. There is a strong policy in favor of making possible an effective sale of good will, and of protecting a trade secret just as any tangible asset of its owner. If, therefore, such a contract is reasonable with reference to the interests of the parties, it is clearly valid. See *Mason v. Provident C. & S. Co.*, [1913] A. C. 724, 738, 740. The only object of the contract in the principal case is to prevent a possible competition by the defendant in the future. And while this does not furnish so strong an argument in favor of validity as the above factors, such contracts are not, in themselves, against public policy, even in America. *Davies v. Racer*, 72 Hun. (N. Y.) 43, 25 N. Y. Supp. 293. The restriction, as regards time and space, would seem on the facts no larger than necessary for the protection of the plaintiff and his assignees. The decision in the principal case therefore seems questionable. The court further touches on the undesirability of depriving the public of the services of the defendants, a consideration not emphasized hitherto in the recent English cases. But this consideration apparently has not been sufficient to overthrow contracts between employer and employee, even in our courts.

CORPORATIONS — ULTRA VIRES — CONTINUING CONTRACT MADE FOR AN UNAUTHORIZED PURPOSE. — In a suit for the breach of a continuing contract to buy coal, the defendant, an interstate carrier (now plaintiff-in-error), introduced evidence that it had made the contract with the dominant purpose to resell the coal. The court's charge permitted recovery whether or not the vendor knew or had means of knowledge that the railroad was engaged in the business of merchandizing coal. *Held*, that the plaintiff cannot recover if it knows, or is chargeable with knowledge of, the railroad's unlawful purpose. *Chesapeake & O. R. Co. v. McKell*, 209 Fed. 514 (C. C. A., 6th Circ.).

It is *ultra vires* for a public-service company to engage in collateral undertakings. See 1 WYMAN, PUBLIC SERVICE COMPANIES, § 703. In cases of loans to a corporation, it has been suggested that the loaning is distinct from the *ultra vires* application of the proceeds. See 18 HARV. L. REV. 463. Yet it would seem that buying a commodity for the purpose of resale is part of a unit undertaking to trade in that commodity, and therefore *ultra vires* for a common carrier. Since the railroad could purchase large quantities of coal for its own consumption, the facts which make this contract a part of an *ultra vires* undertaking are not ascertainable from the charter or certificate of incorporation alone. In such a situation the corporation would be estopped to plead *ultra vires* against a plaintiff who had contracted and acted in ignorance of the facts. *Monument National Bank v. Globe Works*, 101 Mass. 57; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *State Bank v. Hawkins*, 71 Fed. 369. See 3 THOMPSON, CORPORATIONS, § 2802. Upon these principles specific performance of a wholly executory contract has been granted, even in England. The case of a continuing contract, especially where, as here, the plaintiff has put himself in a position to perform, seems an even stronger one. *Eastern R. Co. v. Hawkes*, 5 H. of L. Cas. 331. Since it is the corporation's illegal purpose which taints the present contract, it is submitted that actual knowledge of the company's purpose, or something akin to wilful disregard of facts from which knowledge could be inferred, ought to be fastened on the plaintiff before the defense of *ultra vires* should be allowed to defeat recovery. *Colorado Springs Co. v. American Publishing Co.*, 97 Fed. 843; *Young v. United Zinc Cos.*, 198 Fed. 593. See THOMPSON, CORPORATIONS, §§ 2772, 2773 and note. However, the Supreme Court has been extremely averse to allowing any recovery on an *ultra vires* contract, even going so far as to declare that the corporation cannot act *ultra vires*. The requirement that an outsider, to obtain the benefit of the above doctrine, must first investigate the facts, seems in harmony with this inclination. Undoubtedly, though, this strict rule would not be extended to negotiable instruments, where negligence does not destroy the rights of a holder in due course. For a general discussion of executory *ultra vires* contracts, see 24 HARV. L. REV. 534.

CRIMINAL LAW — FORMER JEOPARDY — CONVICTION UNDER STATUTE PROVIDING NO PUNISHMENT. — The defendant was convicted of a statutory offense for which no punishment was prescribed, but for which he was deprived of certain civil rights. Being later indicted for the same acts under a different section of the code, he set up his former conviction as a bar. *Held*, that the plea discloses a valid defense. *Jenkins v. State*, 80 S. E. 688 (Ga. Ct. App.).

Although most state constitutions prohibit double jeopardy of life or liberty for the same offense, the meaning of the word "liberty" in such provisions has received but little construction. But the same word in the Fourteenth Amendment to the federal Constitution has been construed to mean not only freedom from imprisonment but rights to do ordinary acts. See *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. Rep. 427, 431; *Ex parte Virginia*, 100 U. S. 339, 344. But see 4 HARV. L. REV. 365. It would seem by analogy and from reason that "liberty" in double-jeopardy clauses should similarly be construed broadly. Decisions prohibiting double jeopardy of fines accord with this view. *Brink v. State*, 18 Tex. Cr. App. 344. A more extreme view is that a second trial after a conviction for which a valid sentence cannot be imposed is as obnoxious and oppressive as after an acquittal. See *Hartung v. People*, 26 N. Y. 167, 179. The case is distinguishable, however, from one where the former conviction was had upon a defective indictment; in such case the judgment itself is void. *People v. Larson*, 68 Cal. 18, 8 Pac. 517. The principal case seems clearly correct, for double jeopardy of punishment at least seems prohibited; and the loss of civil rights may be punishment. *Gunning v. People*, 86 Ill. App. 174;



*Commonwealth v. Jones*, 10 Bush. (Ky.) 725; *Ex parte Lange*, 18 Wall. (U. S.) 163, 168, 169. But cf. *State v. Jones*, 82 N. C. 685.

EMINENT DOMAIN — COMPENSATION — WATERWAY CONSTRUCTED BY CITY THROUGH RAILWAY'S RIGHT OF WAY NECESSITATING STRUCTURAL CHANGES. — A city constructed a canal, with walks on either side, through the right of way of a railroad, in order to join certain lakes used for recreation purposes by its inhabitants. This made it necessary for the railroad to build a bridge. *Held*, that the railroad is entitled to compensation for the value of the land taken but not for the cost of building and maintaining the bridge. *Chicago, M. & St. P. Ry. Co. v. City of Minneapolis*, 34 Sup. Ct. 400.

For a discussion of the distinction between taking property under the eminent domain power and under the police power, see NOTES, p. 664.

EQUITY — JURISDICTION — RIGHT TO ENJOIN A THREATENED CRIMINAL PROSECUTION AGAINST A THIRD PARTY. — A statute forbade the shipment by any one, or the receipt for shipment by carriers, of unpasteurized cream to be carried more than sixty-five miles. The business of the complainant, a dairy company, which depended on the receipt of cream from farmers more than sixty-five miles distant, was thereby being ruined because the farmers and railroad company were afraid to ship. Plaintiff, on the ground that the statute was unconstitutional, sought to enjoin the railroad from refusing to accept goods consigned to him, and also to restrain the Attorney-General from prosecuting for breach of the statute. *Held*, that equity will not enjoin a criminal proceeding directed against a party other than the petitioner, nor will the railroad company be enjoined from refusing to accept goods offered. *Milton Dairy Co. v. Great Northern Ry. Co.*, 144 N. W. 764 (Minn.).

Whether the court should have refused to grant an injunction against the railroad is not entirely free from doubt. It is usually held that a railroad cannot justify a refusal to serve by pleading an unconstitutional statute. *Southern Express Co. v. Rose*, 124 Ga. 581, 53 S. E. 185. It may be contended therefore that the railroad, in signifying its unwillingness to receive shipments, was threatening torts involving irreparable injury to the plaintiff, and should be enjoined. However that may be, the court squarely held that, whether or no the statute was constitutional, it would not restrain the Attorney-General from prosecuting the shippers and the railroad unless the injunction was demanded by the persons threatened with prosecution. For a discussion of whether irreparable damage to one's business relations gives a right to enjoin the prosecution of someone else under an unconstitutional statute, see NOTES, p. 668.

EVIDENCE — GENERAL PRINCIPLES AND RULES OF EXCLUSION — REPAIRS AFTER INJURY AS PROOF OF CAUSATION AND POSSIBILITY OF PREVENTION. — The defendant operated an irrigation canal across the plaintiff's land. To show that his orchard was injured by an enlargement of the canal, and that the seepage could have been prevented by cementing the sides, the plaintiff offered evidence of subsequent repairs which had stopped the damage. *Held*, that the evidence is admissible. *Jensen v. Davis and Weber, etc. Co.*, 137 Pac. 635 (Utah).

It is quite well settled that evidence of subsequent repairs cannot be used to show negligence. It is irrelevant, inasmuch as taking precautions for the future is not an admission of culpability in the past; and its admission is against public policy in that it would deter owners from remedying defects. *Aldrich v. Concord & M. R. R.*, 67 N. H. 250, 29 Atl. 408. In the principal case the evidence is relevant on both the issues for which it was offered. Proof that the damage began and ended with the uncemented condition of the canal is convincing both as to causation and as to whether there was a practicable

method of prevention. Of course, the latter lays the foundation for establishing negligence, but it does not in itself indicate that the injury could have been foreseen. As to public policy, there is still some objection. But subsequent repairs are admitted to show ownership or control. *O'Malley v. Twenty-Five Associates*, 170 Mass. 471, 49 N. E. 641. And also to rebut testimony descriptive of the premises before the injury. *McRichard v. Flint*, 114 N. Y. 222, 21 N. E. 153. The objection certainly has less force here than when applied to negligence, and it seems proper to confine it to that situation. In accord with the principal case on causation, see *Kuhn v. Illinois Central Ry. Co.*, 111 Ill. App. 323; *Texas & N. O. R. Co. v. Anderson*, 61 S. W. 424 (Tex. Civ. App.). In accord with it on the possibility of prevention, see *St. Louis, etc. Ry. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104; *Lind v. Uniform Slave and Package Co.*, 140 Wis. 183, 189, 120 N. W. 839, 842.

EVIDENCE — HEARSAY: IN GENERAL — ADMISSIBILITY OF TELEPHONE CONVERSATIONS — RES GESTA. — In an action on an insurance policy the issue was whether the company had received notice of an assignment to the plaintiff. The witness testified that he had seen the policy-holder go to a telephone, had heard him ask for the company and give the notice, and that immediately thereafter the policy-holder had told him that the company was willing to make the transfer. Held, that the evidence is admissible. *Northern Assurance Co. v. Morrison*, 162 S. W. 411 (Tex. Civ. App.).

The difficulties of the principal case are distinct from the line of authority which permits the person who did the talking to testify as to what he had heard over the telephone provided he recognized the voice. *Shawyer v. Chamberlain*, 113 Ia. 742, 84 N. W. 661. See 20 HARV. L. REV. 156. Here both aspects of the testimony seem to violate the hearsay rule. As to the alleged notice, it is hearsay because the witness has no personal knowledge to indicate what individual, if any, is at the other end. It might be accepted as a matter of common knowledge that hearing the call placed practically insures this identity were it not for the fact that the listener has no means of assuring himself that the user of the telephone is not either carrying on a wholly fictitious conversation or talking to an accomplice. But when the lack of personal knowledge has been supplied by extrinsic evidence that a real conversation took place, the evidence becomes admissible. Authority on the point is scant, but it recognizes this distinction. *Miles v. Andrews*, 153 Ill. 262, 38 N. E. 644; *McCarthy v. Peach*, 186 Mass. 67, 70 N. E. 1029. It also appears unsound for the court to admit the subsequent declaration as part of the *res gesta*, since it is neither contemporaneous nor properly explanatory. Its only force is to indicate what the other party said, and in that respect it is pure narration. *Waldele v. New York Central & H. R. R. Co.*, 95 N. Y. 274. See THAYER, LEGAL ESSAYS, 207.

EVIDENCE — JUDICIAL NOTICE — REPORTS TO RAILROAD COMMISSION. — A finding by a railroad commission that certain rates were unreasonable was based on facts contained in certain reports filed, pursuant to statute, by other railroad companies with the commission itself, and with the state board of assessments. These reports had not been introduced in evidence, but were spread on public records. Held, that the reports were proper subjects of judicial notice. *Chicago & N. W. R. Co. v. Railroad Commission*, 145 N. W. 216 (Wis.).

Cases of judicial notice of census returns and of legislative journals seem most closely analogous. *Chicago & A. R. Co. v. Baldrige*, 177 Ill. 229, 52 N. E. 263; *Dane County v. Reindahl*, 104 Wis. 302, 80 N. W. 438. But by the better view even the latter are merely admissible evidence. *Grob v. Cushman*, 45 Ill. 119. See WIGMORE, EVIDENCE, § 2577. The propriety of judicial notice, by a strictly judicial tribunal, of the contents of records like those in the principal



case seems even more questionable. Since they are unofficial statements, their hearsay element renders them less trustworthy, and their contents are neither matters of general notoriety nor of general public interest. Such reports are often made admissible evidence by statute. See, for example, INDIANA ACTS, 1907, ch. 241, § 5. But hearings before administrative boards are conducted under more liberal rules. See *Interstate Com. Comm. v. Baird*, 194 U. S. 25, 44, 24 Sup. Ct. 563, 569; *Cincinnati, H. & D. R. Co. v. Interstate Com. Comm.*, 206 U. S. 142, 149, 27 Sup. Ct. 648, 651. In general, even here, information gleaned outside a particular hearing may not be used to support the finding in that hearing. *Atlantic, C. L. R. Co. v. Interstate Com. Comm.*, 194 Fed. 449. See *United States v. Baltimore & O. S. W. Ry. Co.*, 226 U. S. 14, 20, 33 Sup. Ct. 5, 6; *Interstate Com. Comm. v. Louisville & Nashville R. Co.*, 227 U. S. 88, 93, 33 Sup. Ct. 185, 187. But this requirement seems to be merely to insure fairness, and nothing unfair appears in taking judicial notice of the contents of public records provided for the very purpose of informing the commission, and open to the use of all concerned.

**GOOD WILL — SOLICITATION OF CUSTOMERS AFTER INVOLUNTARY SALE OF GOOD WILL.** — The defendant was a member of a partnership in the boot trade which made an assignment for the benefit of creditors. The assignee sold the business with the good will to the plaintiff. The defendant later in the employment of another firm solicited the trade of his former customers. *Held*, that the defendant will not be enjoined. *Green & Sons v. Morris*, Weekly Notes 65 (Eng. Ch. Div., Feb. 6, 1914).

For a discussion of the question here raised, see this issue, p. 670.

**HUSBAND AND WIFE — CONTRACTS BETWEEN HUSBAND AND WIFE — VALIDITY OF SEPARATION AGREEMENTS.** — A husband and wife, living apart, made an agreement under seal with a trustee by which the husband promised, in contemplation of a reconciliation, to pay the wife a weekly allowance; and in the event of a future separation because of his drinking or cruelty, he agreed to pay for her comfortable maintenance. *Held*, that the agreement is valid. *Terkelson v. Peterson*, 104 N. E. 351 (Mass.).

The Massachusetts court has held that a note given the wife by her husband in consideration of the resumption of the marital relation is void on the ground that it is against public policy for money to have influence in such a matter. *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271. *Contra*, *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227; *Burkholder's Appeal*, 105 Pa. 31. As the court points out, however, the arrangement here is fixing a sum for the support of the wife, due her from him, and not a payment for her return. The stipulation for support in the contingency of fresh separation is more troublesome. A separation agreement to take effect immediately, or made when separation has occurred, is valid. *Clark v. Fosdick*, 118 N. Y. 7, 22 N. E. 1111; *Henderson v. Henderson*, 37 Ore. 141, 60 Pac. 597. But an agreement for a future separation is held void. *Hindley v. Westmeath*, 6 B. & C. 200. In the principal case the contingencies on which separation might occur, drinking and cruelty, would be grounds for divorce. This might well weigh in favor of the agreement, although it is to be remembered that courts wish to keep divorce matters in their own hands. *Harrison v. Harrison*, [1910] 1 K. B. 35. The court also says that the agreement is for payment after separation, and not for separation; but this distinction seems invalid and is not supported by the cases. On the whole the agreement here is certainly more in favor of the marriage relation than against it, and the court has justly held it valid. *Hite v. Hite*, 136 Ky. 529, 124 S. W. 815.

**INJUNCTIONS — ACTS RESTRAINED — ILLEGAL CLAIM TO PUBLIC OFFICE.** — The office held by the plaintiff was illegally declared vacant and a successor

appointed. The plaintiff, in possession, seeks to enjoin the appointee from taking the oath of office and the county clerk from administering it. *Held*, that the injunction will not issue. *Price v. Collins*, 89 Atl. 383 (Md.).

To oust one wrongfully in possession of an office, proceedings in *quo warranto* afford an adequate remedy at law. *The King v. The Mayor of Colchester*, 2 T. R. 259. Consequently an injunction will not issue for this purpose. *Arnold v. Henry*, 155 Mo. 48, 55 S. W. 1089; *Hurlo v. Hahn*, 75 Wis. 468, 44 N. W. 507. But *quo warranto* is not available to protect one actually in possession against wrongful claimants. *The King v. Whitwell*, 5 T. R. 85; *Osgood v. Jones*, 60 N. H. 282. Furthermore, neither a writ of mandamus nor a writ of prohibition will issue, since the former is solely affirmative, and the latter is only available to restrain the wrongful exercise of judicial functions. *People v. Ferris*, 76 N. Y. 326; *State v. Justices*, 41 Mo. 44. One in possession, however, may merely refuse to relinquish his possession. *Coleman v. Glen*, 103 Ga. 458, 30 S. E. 297. His acts will be valid as a *de facto*, if not *de jure*, public officer. *State v. Williams*, 5 Wis. 308. Whether, if the later appointee should wrongfully turn the plaintiff out, the latter could recover the emoluments of the office, has not been decided in Maryland. The better view would allow such recovery. *Mayor v. Woodward*, 12 Heisk. (Tenn.) 499, 79 Me. 484, 10 Atl. 458 (and see note, 10 Am. St. Rep. 284). The weight of authority indeed is *contra*. *Commissioners v. Andrews*, 20 Kan. 298. But for the purposes of this case an adequate protection at law for such rights may be assumed. The mere right to public office is solely political, and not a property right, even in the broad sense of substantial rights. *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 1009. In general, equity concerns itself only with the protection of rights of the latter class. So that illegal proceedings for an officer's removal, or, as in the principal case, the appointment and qualification of his successor, which only cloud the rightful incumbent's title to the office, will not be enjoined. *White v. Berry*, 171 U. S. 366, 18 Sup. Ct. 917; *People v. District Court*, 29 Colo. 277, 68 Pac. 224. On the other hand, if a substantial injury is threatened, as by a physical interference with the possession of property, equity will enjoin it as any other trespass is enjoined. *Huntington v. Cash*, 149 Ind. 255, 48 N. E. 1025; *Brady v. Sweetland*, 13 Kan. 41. *Contra*, *State v. Seehon*, 143 Mo. App. 182, 128 S. W. 250. The right to such an injunction is dependent solely on possession, irrespective of title, and it will issue as well for an officer *de facto* as *de jure*. *State v. Superior Court*, 17 Wash. 12, 48 Pac. 741. And from a policy of securing the orderly administration of public affairs, equity often acts after a threat of merely nominal interference. *Seneca Nation v. Jameson*, 62 N. Y. Misc. 91, 114 N. Y. Supp. 401. But the principal case is clearly correct, since there was no threat of interference whatever.

**INSURANCE — EMPLOYER'S LIABILITY INSURANCE — LIABILITY OF INSURER FOR EXPENSE INCURRED BY EMPLOYER IN DEFENSE OF A CLAIM BY AN INJURED EMPLOYEE.** — An insurance company insured an employer against liability to any employee up to \$1500, — the company to have the option to defend any actions brought. An injured employee offered to settle for \$1500, but the company chose to defend, and a verdict for \$6000 resulted. On the company's refusal, the insured appealed at his own expense, and the complaint was dismissed. The insured then sued the company for the expenses of the appeal, \$2211, and was permitted to recover. *Brassil v. Maryland Casualty Co.*, N. Y. L. J. 2791.

The court negatived the existence of any express or implied duty to appeal, arising from the contract, or any general duty that the insurance company must always appeal whenever they defend. But it held that in the peculiar circumstances, where the insurance company, by refusing to compromise, throws on the insured the risk of a verdict larger than the indemnity contracted for,



and accepts no added risk itself, there is a duty to do all things reasonably necessary to protect the interests of the insured, even though such action would not result in any benefit to themselves. Since this does not necessarily imply a fiduciary relation between insurer and insured, such a limited obligation, though novel, would seem just and beneficial. Another explanation of the case would be the existence of relational duties between insurer and insured as between principal and agent. But it is doubtful if these exist. Cf. *Everson v. Eq. Life Assur. Soc.*, 71 Fed. 570. See RICHARDS ON INSURANCE, § 70. If such a duty is denied, recovery might be had on quasi-contractual principles. The complainant is not an officious intermeddler, nor does the benefit to the defendant seem to be merely incidental when compared with cases allowing recovery by a co-tenant of payments for repairs and taxes. *United States v. Pac. R. Co.*, 120 U. S. 227; *Calvert v. Johnson*, 99 Mass. 74; *Graham v. Dennigan*, 2 Bosw. (N. Y.) 516. On this ground, however, the measure of damages would appear to be only one-fourth of the expenses incurred by the plaintiff, since to that amount only is the defendant unjustly enriched.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE-ROUTE OVER HIGH SEAS WITH TERMINI WITHIN ONE STATE. — The plaintiff, a California corporation, operated a line of steamships running from one port in California to another port in the same state, part of the voyage being on the high seas. The State Railroad Commission undertook to regulate the rates charged. *Held*, that the commission has this power. *Wilmington Transportation Co. v. Railroad Commission of California*, 137 Pac. 1153 (Cal.).

The Commerce Clause of the Constitution is held to prevent the regulation by a state of rates for land transportation having both termini in that state, but where the route passes through another state. *Hanley v. Kansas City So. Ry. Co.*, 187 U. S. 617, 23 Sup. Ct. 214. See 16 HARV. L. REV. 597. Interpreting this as an interference with interstate commerce seems desirable on grounds of expediency, since otherwise it would be impossible to prevent interference and regulation by the intermediate state. The sovereign of the home port alone has jurisdiction of a ship on the high seas, there being no territorial sovereignty. See 27 HARV. L. REV. 268. There is in the principal case therefore no danger of adverse regulation. And it seems unsound to argue that this is interstate or foreign commerce, the power to regulate which has been delegated to Congress alone. *Contra*, *Pacific Coast S. S. Co. v. Board of R. Commissioners*, 18 Fed. 10. The language to the contrary in *Lord v. Steamship Co.* 102 U. S. 541, has been discredited by a later case and the actual holding has been explained as merely an exercise of the powers of Congress over maritime matters. See *Lehigh Valley Ry. Co. v. Pennsylvania*, 145 U. S. 192, 203, 12 Sup. Ct. 806, 808. But cf. *Abby Dodge v. United States*, 223 U. S. 166, 32 Sup. Ct. 310. However, a breach of a maritime contract of affreightment, or an injury from a discrimination in steamship rates, would be within admiralty jurisdiction. *Carpenter v. The Emma Johnson*, 1 Cliff. (C. Ct.) 633; *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, 29 Pac. 873. No case has been found where questions concerning the reasonableness of steamship rates have been treated as within the jurisdiction, of admiralty courts. Even if it is a matter of maritime jurisdiction, since the termini of the voyage are within one state, it is clearly one in which uniformity of regulation is not necessary. And the states may legislate in such matters until Congress has acted. For a discussion of this proposition, see 27 HARV. L. REV. 578.

JUDGMENTS — ASSIGNMENT OF JUDGMENTS — EFFECT OF ASSIGNMENT UPON RIGHT TO SET OFF MUTUAL JUDGMENTS. — A. held a judgment against B. Subsequently B. obtained a judgment against A. on another claim, and B. assigned a half-interest in it to C., who paid value and had no notice of A.'s

judgment. A. brings a bill in equity, joining B. and C., to enforce a set-off of his judgment against the judgment obtained by B. *Held*, that C. took clear of the set-off. *Davidson v. Lee*, 162 S. W. 414 (Tex. Civ. App.).

A judgment, for the purposes of assignment, should be regarded like other choses in action. See 2 FREEMAN ON JUDGMENTS, 4 ed., § 422. Thus, as here, a partial assignment should give the assignee rights in equity. *Line v. McCall*, 126 Mich. 497, 85 N. W. 1089; *Pittsburgh, C., C. & St. L. Ry. Co. v. Volkert*, 58 Oh. St. 362, 50 N. E. 924. *Contra*, *Loomis v. Robinson*, 76 Mo. 488. But contrary to the principal case, it would seem that an assignee, even for value and without notice, should secure merely the rights of the assignor, and should be subject to any set-off in favor of the obligor. *Brown v. Hendrickson*, 39 N. J. L. 239; *Peirce v. Bent*, 60 Me. 381. See 2 BLACK ON JUDGMENTS, § 954. Some courts, however, permit the *bonâ fide* assignee to take free of the set-off, unless the assignor was insolvent at the time of the assignment. *Ellis v. Kerr*, 11 Tex. Civ. App. 349, 32 S. W. 444; *Henderson v. McVay*, 32 Ala. 471. Still others allow the set-off only where this attains an equitable result. *Ames v. Bates*, 119 Mass. 397; *Hovey v. Morrill*, 61 N. H. 9. However, it seems doubtful equity to prefer the assignee, for that imposes on the obligor an arduous duty of notice in favor of one who could readily have discovered the true state of the relation between assignor and obligor. The principal case, accordingly, seems difficult to support.

PUBLIC-SERVICE COMPANIES — REGULATION OF PUBLIC-SERVICE COMPANIES — TELEPHONE COMPANIES: COMMISSION'S ORDER COMPELLING PHYSICAL CONNECTIONS. — The plaintiff company, operating long-distance telephone lines in the state, and local lines in various counties, was ordered by the California public-service commission to make physical connections with two local companies operating in counties in which the plaintiff company had a local service, in order to give the local companies the benefit of the plaintiff's long-distance service. *Held*, that the order is void. *Pacific Tel. & Tel. Co. v. Eshleman*, 137 Pac. 1119 (Cal.).

The court thought the order an attempted exercise of the power of eminent domain, and declared it void because it did not provide compensation for the property taken. The premise seems erroneous. See this issue of the REVIEW, at p. 664. Nor does it seem entirely accurate to call the order one made under the police power. *Cf.* GUTHRIE, FOURTEENTH AMENDMENT, 74. It is an exercise of the ancient power of the state over businesses affected with a public interest. See WYMAN, PUBLIC SERVICE CORPORATIONS, § 19. Orders of commissions under this power require obedience without compensation, and are upheld if reasonable. *Pittsburgh, C., C. & St. L. Ry. Co. v. Railroad Commission of Indiana*, 171 Ind. 189, 202, 208, 86 N. E. 328, 333, 335. Courts have laid down no satisfactory test of reasonableness, but most of the cases support the distinction that the order for connections is reasonable if the public cannot be adequately served without the connections ordered. *Wisconsin, etc. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115; *Louisville & N. R. Co. v. Interstate R. Co.*, 107 Va. 225, 57 S. E. 654. In only a few cases have orders for connections between telephone companies been involved. Two situations may occur. If the companies do not cover the same territory, but reach the same town, an order for connections should be upheld, for only thus can the public be adequately served. *Cf.* *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644. The case is perhaps comparable to that where railroads running into the same city are forced to make connections and receive cars from each other. If, on the other hand, the situation is like that in the principal case, the public can be properly served with the existing facilities; hence it is unreasonable to compel a company to make expenditures or to share its advantageous position with a competitor. *Cf.* *Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535;



*Illwaco Ry. & Nav. Co. v. Oregon Short Line & U. N. R. Co.*, 57 Fed. 673. *Contra*, *Pioneer Tel. & Tel. Co. v. Grant County Rural Tel. Co.*, 119 Pac. 968 (Okla.). On this ground the principal case is sustainable. Cases where the power of eminent domain is actually exercised are of course distinguishable. *Billings Mut. Tel. Co. v. Rocky Mountain Bell Tel. Co.*, 155 Fed. 207.

RAILROADS — LIABILITY FOR FIRES — CONTRIBUTORY NEGLIGENCE OF ABUTTING LANDOWNER. — The plaintiff stacked flax straw on his own land near the defendant railroad's right of way. It was destroyed by fire caused by the negligent escape of sparks from a locomotive. *Held*, that the defense of contributory negligence is not open to the defendant. *Le Roy Fibre Co. v. Chicago, Milwaukee & St. P. Ry. Co.*, U. S. Sup. Ct., Feb. 24, 1914.

The liability of a railroad for fires caused by sparks escaping from a locomotive ordinarily depends on negligence. *Flinn v. New York Cent. & H. R. R. Co.*, 142 N. Y. 11, 36 N. E. 1046; *Bernard v. Richmond, F. & P. Ry. Co.*, 85 Va. 792, 8 S. E. 785. By statute in some states the burden of proving that there was no negligence is on the railroad. *Green Ridge R. Co. v. Brinkman*, 64 Md. 52, 20 Atl. 1024. Other statutes, however, impose an absolute liability. *Union Pacific Ry. Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752. Under such statutes the railroad is practically an insurer of the safety of adjoining property and the plaintiff's negligence is immaterial. *West v. Chicago & N. W. Ry. Co.*, 77 Ia. 654, 35 N. W. 479, 42 N. W. 512. See 25 HARV. L. REV. 463, 465. When the railroad's liability depends on negligence, the question arises whether it is contributory negligence in a landowner to allow the accumulation or deposit of inflammables near the right of way. Even admitting it negligent, the last clear chance doctrine is clearly applicable and the plaintiff should not be barred. *Davies v. Mann*, 10 M. & W. 546. See 14 HARV. L. REV. 74. But it does not seem that depositing property near the right of way constitutes negligence. The landowner may assume the risk of damage from fire where it is caused not by the railroad's negligence but by pure accident; but this, in the absence of statute, would furnish no ground for recovery. Where the damage is caused by negligent sparks the situation is essentially different. The landowner is entitled to assume that the railroad will not be negligent, and to place on him a duty to guard against the railroad's negligence practically subjects his land to an easement in favor of the railroad. Accordingly the weight of authority agrees with the principal case. *Chicago & E. R. Co. v. Smith*, 6 Ind. App. 262, 33 N. E. 241; *Alabama & V. Ry. Co. v. Sol Fried Co.*, 81 Miss. 314, 33 So. 74; *Kellogg v. Chicago & N. W. Ry. Co.*, 26 Wis. 223. *Contra*, *Murphy v. Chicago & N. W. Ry. Co.*, 45 Wis. 222; *Omaha Fair & Exposition Ass'n v. Missouri Pac. R. Co.*, 42 Neb. 105, 60 N. W. 330.

RULE IN SHELLEY'S CASE — APPLICATION OF ARCHER'S CASE IN AMERICA. — A deed in substance conveyed property to Sarah for life and "upon her death to the heirs of the body of said Sarah, their heirs and assigns." *Held*, that the rule in Archer's case applies, and that the heirs of the body of Sarah take a contingent fee by way of purchase. *Ætna Life Ins. Co. v. Hoppin* (C. C. A., 7th Circ. Not yet reported).

For a discussion of the application of the rule in Archer's case in America, see page 673 of this issue.

TAXATION — GENERAL LIMITATIONS ON THE TAXING POWER — CONSTITUTIONAL RESTRICTIONS — TAXATION OF FOREIGN PERSONALTY AND DUE PROCESS OF LAW. — A federal statute imposed a tax upon the owners of foreign-built pleasure yachts. The defendant, though domiciled within the United States, had kept his yacht in Europe since 1904, and objected to the

tax as a violation of the Fifth Amendment. *Held*, that the tax is constitutional. *United States v. Bennett*, 34 Sup. Ct. 433.

For a discussion of the constitutional restrictions on taxation, see this issue of the REVIEW, p. 675.

**TORTS — DAMAGE TO CONTRACT RIGHT BY ACT OF THIRD PARTY — RIGHT OF ACTION FOR SEDUCTION OF FIANCÉE.** — The defendant seduced the plaintiff's affianced wife. The plaintiff sues, alleging that the defendant "maliciously interfered with the marriage contract then subsisting, causing the plaintiff properly to break it." The defendant demurs. *Held*, that the demurrer be sustained. *Davis v. Condit*, 144 N. W. 1089 (Minn.).

A promise to marry creates a certain confidential relation above that of the ordinary relation of promisee and promisor. *Kline v. Kline*, 57 Pa. St. 120; *Ward v. Ward*, 63 Oh. St. 125, 57 N. E. 1095. But a man has no right to the services of his fiancée, and it seems clear that there is no such status as to give the man a right of action for interference with it, analogous to the action for criminal conversation. However, chastity is at least an implied condition in a contract to marry, and the woman's lapse excuses the man's performance. *Irving v. Greenwood*, 1 Car. & P. 350; *Von Storch v. Griffin*, 77 Pa. St. 504. Accordingly the plaintiff should have an action against the defendant who has intentionally (or maliciously) deprived him of the benefit of a contract, by preventing the happening of the condition. *Cf. Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869; *Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934. It is submitted, moreover, that the woman impliedly promised to remain chaste. See *Sheahan v. Barry*, 27 Mich. 217, 222. Therefore a lapse from virtue is a breach of contract and should give the man a right of action against the fiancée and consequently also against one who has intentionally procured the breach. *Lumley v. Gye*, 2 El. & Bl. 216; *Walker v. Cronin*, 107 Mass. 555. Regarding the defendant's conduct either as the preventing of the happening of a condition or as the procuring of a breach, this result seems clear on authority, provided that the defendant acted intending to interfere with the contract. It is hard to see on principle why the same result should not follow in any case where the defendant acts knowing of the contract, or even when he ought to know of it, but the authorities seem to stop short of this. See 24 HARV. L. REV. 397. However, it has been suggested that to allow an action against a third party who has been instrumental in causing a breach of a contract to marry would be "subversive of proper liberty of marriage" and would "degrade rather than add to the sanctity of the marriage relation." Editorial in N. Y. L. J. Volume L, at p. 2884.

**TORTS — UNUSUAL CASES OF TORT LIABILITY — NEGLIGENT INTERFERENCE WITH PROBABLE EXPECTANCY OF BUSINESS.** — The neighborhood around the plaintiff's grist mill was depopulated because of malaria arising from waters backed up by the defendant power company's dam. The plaintiff sues for the loss of business due to the departure of his customers. *Held*, that he cannot recover for this. *Central Ga. Power Co. v. Stubbs*, 80 S. E. 636 (Ga.).

Any one who has been injured by another acting intentionally and without justification may recover for the injury inflicted. See *Skinner & Co. v. Shew*, [1893] 1 Ch. 413, 422; *Aikens v. Wisconsin*, 195 U. S. 194, 204. This general principle is illustrated by the actions for intentionally procuring a breach of contract and for an intentional interference with a probable expectancy of business, where the specific injury does not fall within any of the historical categories of tort liability. *Lumley v. Gye*, 2 El. & B. 216; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230. The duty to use due care to avoid causing unintended harm to others should in any symmetrical system



be equally comprehensive. See POLLOCK ON TORTS, 9 ed., 22 *et seq.*; s. c. SALMOND ON TORTS, 3 ed., 24. If recovery may be had for a certain injury, when it is intentionally inflicted, it should likewise give rise to an action when it is caused by negligent conduct. Consequently there seems no rational explanation for the refusal of most courts to allow recovery against one who fails to use due care in a situation where it is foreseeable that such failure will jeopardize another's contract rights. *Anthony v. Slaid*, 52 Mass. 290; *Byrd v. English*, 117 Ga. 191, 43 S. E. 419. The principal case invites the same criticism. The court would not refuse to take cognizance of this sort of damage if it were intended. The foreseeability of harm to a class of which this plaintiff is one, raised a duty to abstain from certain conduct; and persistence in it is the direct cause of the very injury which was foreseeable. *Metallic Com. Co. v. Fitchburg R. Co.*, 109 Mass. 277. The refusal of most courts to apply the general principle here suggested is due to a conservative dread of extending liability and stimulating litigation. But there would seem to be no ground for such fears, if recovery is limited to situations like that disclosed in the principal case, where the duty and the causation are clear.

TRANSFER OF STOCK — COLORABLE ASSIGNMENT TO QUALIFY ASSIGNEE AS DIRECTOR: RIGHTS OF CREDITORS OF ASSIGNEE. — The plaintiff caused one share of her stock in a corporation to be registered in the name of her son-in-law in order to make him eligible to the office of director under a statute requiring directors to be stockholders. The defendant attached the share of stock with the corporation as the property of the registered holder. The plaintiff, alleging she is the beneficial owner, seeks to enjoin the attachment. *Held*, that the injunction be granted. *Gray v. Graham*, 89 Atl. 262 (Conn.).

Ordinarily in a contest between a creditor of the registered owner of stock and one who has the beneficial interest, the latter is preferred. *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Lund v. Wheaton Co.*, 50 Minn. 40, 52 N. W. 268; *Hazard v. National Exchange Bank*, 26 Fed. 94. This view is a consequence of the almost universal rule that an attaching creditor is not a *bonâ fide* purchaser. Moreover, quite apart from this rule, the doctrine would be justified by the demands of business convenience. Of course, the creditor cannot claim to have been misled by the form of registration, since the stock books are for the information of the corporation only. There is no common-law rule that a director be a stockholder. *Wright v. Springfield & New London Railroad Co.*, 117 Mass. 226. At the present time, however, this is almost universally required by statute or by-laws. It is held in several jurisdictions that this means only that a director must be the registered owner. *In re Ringle*, 145 App. Div. 361, 130 N. Y. Supp. 62; *Pullbrook v. Richmond Consolidated Mining Company*, 9 Ch. Div. 610. Other jurisdictions require that the director be the beneficial owner, since the purpose of the provision is to insure the election of men whose interests will induce them to conduct the business for the benefit of the corporation and to prevent the election of mere dummies doing the will of concealed principals. *Bartholemew v. Bentley*, 1 Oh. St. 37. If the latter view is correct the plaintiff, in the principal case, by his conduct, participated in the violation of the policy of the law, and on the familiar principle of clean hands he should have no relief in a court of equity. Most of the cases holding the contrary view involve the breach only of a by-law. In such a case it might be said that there is a wrong to the corporation only and that no third party should be allowed to take advantage of it collaterally. *Cooper v. Griffin*, [1892] 1 Q. B. 740; *In re The Blakely Ordnance Company*, 25 W. R. 111. *Lanzan v. Francklyn*, 20 N. Y. Supp. 404 (City Ct., Brooklyn). But in the principal case, although the violation of a statute is involved, the court, while deliberately denouncing the action of the plaintiff as a wrong to the public

as well as to the corporation, reaches the seemingly inconsistent result of giving the wrongdoer equitable relief.

**USURY — FORFEITURES — RELEASE OF RIGHT TO SUE FOR PENALTY.** — In an action to recover for usury paid, the defendant pleaded a release of all claims for usury. The consideration for the release was a fresh usurious loan. *Held*, that the release is binding. *Cotton v. Beatty*, 162 S. W. 1007 (Tex.).

The right to recover usury paid may be waived by a release given for good consideration. *Broadwell's Adm'rs v. Lair*, 10 B. Mon. (Ky.) 220; *Wing v. Peck*, 54 Vt. 245. When, however, as in the principal case, the consideration for the release is a fresh usurious loan, the whole transaction should be void, and the release should be ineffective. *International Building & Loan Ass'n v. Biering*, 86 Tex. 476, 25 S. W. 622. Indeed, releasing the claim is in effect an added sum paid for the fresh loan and might well in itself change a legal rate of interest into an usurious rate. *Cf. Schroepel v. Corning*, 5 Denio (N. Y.) 236, 247. The result of the principal case is to cure usury with usury. It seems indeed strange that a court should be deceived by so transparent a device for evading the law.

**WILLS — CONSTRUCTION — PARTICULAR WORDS: "CHILDREN" HELD TO MEAN ONLY LEGITIMATE CHILDREN.** — The testatrix by will left property in trust for "all or any the children or child" of her brother. He had six illegitimate children by a woman who was commonly accepted as his wife, and two legitimate children by a subsequent marriage. The testatrix supposed the children were all legitimate. *Held*, that only the two legitimate children are entitled. *In re Pearce. Alliance Assurance Co. v. Francis*, [1914] 1 Ch. 254 (C. A.).

The principal case illustrates the operation of the well-established rule of construction that the word "children" in a will means, *prima facie*, legitimate children. *Cartwright v. Vawdry*, 5 Ves. 530; *Collins v. Hoxie*, 9 Paige (N. Y.) 81; *Heater v. Van Aiken*, 14 N. J. Eq. 159. See 2 JARMAN ON WILLS, 5 Am. ed., 786, 6 Eng. ed., 1748; 2 WILLIAMS ON EXECUTORS, 7 Eng. ed., 1099. The cases, however, allow this presumption to be rebutted in but two ways. The illegitimate may take if the language of the will shows such an intent, either expressly, or by necessary implication, as, for example, "all the children of her body." *Sullivan v. Parker*, 113 N. C. 301, 18 S. E. 347. See *Hill v. Crook*, L. R. 6 H. L. 265, 283. Mention of the children by name is likewise an example of this class. *Meredith v. Farr*, 2 Y. & C. Ch. 525; *Williams v. MacDougall*, 39 Cal. 80. Or the presumption may be overcome if there are no legitimate children, and the particular legacy or devise would otherwise fail. *In re Eve*, [1909] 1 Ch. 796; *Gardner v. Heyer*, 2 Paige (N. Y.) 11. See *Hill v. Crook*, *supra*, 282. But the House of Lords refused to include within the latter class a case where the testator, when the will was made, might possibly have contemplated lawful children, although none in fact were ever born. *Dorin v. Dorin*, L. R. 7 H. L. 568. See *Ellis v. Houston*, L. R. 10 Ch. Div. 236, 243. Extrinsic evidence of intent to include illegitimates is generally held inadmissible. *Ellis v. Houston*, *supra*; *Collins v. Hoxie*, *supra*. Thus the court here was clearly bound by authority. As an original question, however, it would seem that this presumption should be rebuttable by evidence of the circumstances under which the will was executed. See *In re Scholl's Estate*, 100 Wis. 650, 661, 76 N. W. 616, 619; 4 WIGMORE, EVIDENCE, § 2463.

**WITNESSES — IMPEACHMENT — CHARACTER EVIDENCE TO SUSTAIN WITNESS IMPEACHED BY ADMISSION OF FORMER CONVICTION ON CROSS-EXAMINATION.**



TION. — The plaintiff, as a witness in his own behalf, admitted upon cross-examination that he had been convicted of the crime of forgery and served a term in the state prison. On the theory that his character had been impeached, he then sought to introduce evidence of his general reputation for truth. *Held*, that the evidence is inadmissible. *Derrick v. Wallace*, 145 N. Y. Supp. 585 (Sup. Ct. App. Div.).

Evidence of a witness's reputation for truth is not admissible until his character has been impeached. *State v. Owens*, 109 Ia. 1, 79 N. W. 462. Contradictory evidence, or proof of inconsistent statements out of court, or inconsistencies elicited on cross-examination, are as consistent with mistaken observation as with untruthfulness, and, if they involve the character of the witness at all, do so only incidentally. Thus, in these situations it is held not worth while prolonging the trial with evidence of his good reputation. *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Tedens v. Schumers*, 112 Ill. 263. *Contra*, *George v. Pilcher*, 28 Gratt. (Va.) 209. Where, however, the attack is directed at the witness himself, by proof of collateral matter showing him to be the kind of man whom the jury ought not to believe, the party calling him should be permitted to sustain the witness's character by evidence of his reputation for veracity. *Webb v. State*, 29 Oh. St. 351. And although the attack is by proof of specific, discrediting acts, nevertheless his character is directly involved. *Gertz v. Fitchburg R. R.*, 137 Mass. 77. The suggestion of the principal case that, where these facts are elicited on cross-examination the only method of rehabilitation should be by redirect examination to explain them, is unsound. The only bearing of these former crimes upon the credibility of his testimony is by inference to the witness's bad character. *Kraimer v. State*, 117 Wis. 350, 93 N. W. 1007; *People v. Amanacus*, 50 Cal. 233. Where, as in the principal case, the discrediting acts occurred some years back, the witness should at least be permitted to show that he has since acquired a good reputation for truth. *Shields v. Conway*, 133 Ky. 35, 117 S. W. 340; 2 WIGMORE, EVIDENCE, § 1117. For a review of the authorities, see 2 WIGMORE, EVIDENCE, § 1106.

## BOOK REVIEWS.

THE PRINCIPLES OF JUDICIAL PROOF. By John Henry Wigmore. Boston: Little, Brown, and Company. 1913. pp. xvi, 1179.

This important and most interesting book "aspires to offer, though in tentative form only, a *novum organum* for the study of Judicial Evidence." No one living has such qualifications for this work as Professor Wigmore, and by his present attempt he has not a little increased the great debt which scholars and practitioners already owe him.

The introduction emphasizes the distinction between Proof in the general sense — the process of persuading the mind by reasoning — and Admissibility — determined by rules of law aimed to protect the tribunal from erroneous persuasion and waste of time. These rules of admissibility, with which our law of evidence is concerned, "are destined to lessen in relative importance during the next generation or later. Proof will assume the important place; and we must therefore prepare ourselves for this shifting of emphasis." The experience of continental Europe in its change from "the ancient worn-out numerical system of 'legal proof'" to "the so-called 'free proof,' namely, no

system at all," is made a warning of the need to prepare by a scientific study of the principles of "natural proof" for "the coming stage of the law of Evidence, — an epoch in which the present rules of Admissibility, already become too largely formalistic and unreal, will be partly supplanted by a new method." Such a method the author proceeds to suggest. Believing that "there must be a probative science independent of the artificial rules of procedure," though it "may as yet be imperfectly formulated or even incapable of formulation," he seeks a "*method of solving* a complex mass of evidence in contentious litigation" — "some method which will enable us to lift into consciousness and to state in words the reasons why a total mass of evidence does or should persuade us to a given conclusion, and why our conclusion would or should have been different or identical if some part of that total mass of evidence had been different. The mind *is* moved; then can we not explain *why* it is moved? If we can set down and work out a mathematical equation, why can we not set down and work out a mental probative equation?"

He approaches the solution of this problem by first taking up, in the earlier divisions of the book ("Circumstantial Evidence" and "Testimonial Evidence") the accurate analysis of the inference proposed in any case by an offer of proof, using as material for the study "the *various kinds of specific evidential facts commonly offered in litigation*, and their *possibilities of inference*." Each extract in these earlier chapters is to be used for preliminary drill in analyzing "the actual mind-to-mind process of persuasion and belief," and the rules of evidence are to be totally disregarded. The problem is to be exactly that of a juror "if the evidence were safely in the case and the counsel were arguing to him about it." This leads up to the main objective, "the method of solving a complex mass of evidence in contentious litigation," dealt with in Part III, "Problems of Proof in Masses of Mixed Evidence." A system is here offered for presenting in diagrammatic form, by a great variety of symbols, the probative effect of each piece of proof in a body of evidence — "the relation of each evidential fact to each and all others."

In this chapter, as in the others, Professor Wigmore has added a great variety of extracts as specimens to be used in applying his method. In doing so he has shown the same sure instinct for the illuminating practical illustration, and the same unflinching power of intellectual stimulation, which are to be seen in his other writings, and he has made his selections with a range and richness unattainable by another. His characteristically modest hope "that the illustrations will furnish entertaining reading in a field little patronized hitherto by lawyers" is far within the fact. No description, indeed, can prepare the reader for the varied fascination of the views opened by many windows into fields of psychology, history and literature. Among nearly four hundred extracts, Coke, Best and Hans Gross rub elbows with Balzac, Dickens and Robert Louis Stevenson, Royce, Whately and William James. Professor Münsterberg's applied criminal psychology is found in company with an extract (would it were longer!) from Professor Wigmore's trenchant commentary; finger-print identification is expounded with illustrations, and remarkable criminal trials from every time and country are brought together and summarized with skill. The mere names of a few will indicate the richness of the collection. The White murder trial, with plans, testimony and the defendant's argument, as well as Webster's, gathered from rare sources, occupies nearly ninety pages. There is an even fuller account of *Throckmorton v. Holt*, taken from contemporary newspapers, with facsimiles of the mysterious will which bore the names of President Grant and General and Mrs. Sherman, and of the envelope which brought it from its unknown source to the Register of Wills; the Hillmon case is reproduced at length from sources equally inaccessible to the ordinary reader; Durrant, Luetgert, Madeleine Smith and Tichborne are but a few other names selected at random. A list of trials useful for study, and much new matter



from Professor Wigmore's own pen, should not be forgotten. Altogether it is a book which, once opened, a lawyer will lay down only upon compulsion.

The apparatus offered by Professor Wigmore for solving a complex mass of evidence is subject to limitations which he sees clearly and states with candor. "It can hope to show only what our belief actually is, and how we have actually reached it." "All that the scheme can do for us is to make plain the entirety and details of our actual mental process. It cannot reveal laws which should be consciously obeyed in that process. This is because no system of logic has yet discovered and established such laws. There are no known rules available to test the correctness of the infinite variety of inferences presentable in judicial trials." "For these and other reasons, then, it must be understood that the desired scheme is not expected to tell us what ought logically to be our belief, either as to individual subordinate data or as to the final net fact in issue." Even so, the conditions of the problem are so intricate that the attempt at complete graphic analysis carries with it, as Professor Wigmore points out, a constant danger of too complicated symbols. And no matter how accurate the analysis and distribution of the matter, there must still be an inherent incompleteness resulting from the attempt to solve on paper a problem of the courtroom. For no presentation could put the reader in the jury's position, or show "explicitly in a single compass how we *do reason and believe* for those individual facts and from them to the final fact," without reproducing a thousand significant impressions from look and bearing of witnesses. Perfectly as Professor Wigmore's chart presents the facts in *Commonwealth v. Umilian*, or *Hatchett v. Commonwealth*, and their logical relations, one realizes that what to the reader is black and white on a flat sheet was high relief and vivid color for the hearer; and that in the jury's work of balancing probabilities the result may have depended at every step on those very heights and shades. This, which Professor Wigmore would be the first to recognize, does not detract from the interest of his scheme, but only indicates necessary limitations on what it can accomplish. As he wisely says, "Men's aptitudes for the use of such schemes vary greatly," and the precise manner in which his system will be used by different persons is likely to differ. "Each person may contrive his own special ways of using these or other symbols." But in one way or another the practitioner may obtain from the system the same tonic effect in strengthening and clearing his thought that comes to the brief writer from a rigid adherence to logical form in framing his headings and arranging his matter. Even though he later destroy all the scaffolding, it was what brought correctness and solidity to the structure.

The use of the book in teaching may well depend on like questions of individual aptitude and individual variation. Teaching is a matter more of men than of methods, and no one can teach effectively what he has not mastered for himself and passed as a reality through his own consciousness. The mere reading of this book shows how illuminating a course might be based on it if conducted by its compiler; whether it could be made a success by another would depend on how far he had caught the same spirit. Without this, one can see how the course might end in the attempt to present in the classroom what had better be left for the courtroom. But no thoughtful student of the law of evidence can fail to find delight and instruction between its covers.

E. R. T.

COMMENTARIES ON THE LAW OF MASTER AND SERVANT, Including the Modern Laws on Workmen's Compensation, Arbitration, Employers' Liability, etc. By C. B. Labatt. Rochester: The Lawyers' Co-operative Publishing Company. 1913. 8 volumes. pp. lvi, xxxii, xxi, xix, xxvii, xxviii, xv, xxv, 10,090.

It is impracticable to give the topics of the one hundred and twenty-four chapters into which this work is divided. The general scope is sufficiently indicated by sub-titles appearing upon the backs of the volumes, *viz.*: Relation and contract, wages, hours of labor, employers' liability, statutes and contracts, compensation acts, blacklisting, rights in products of service, apprentices, master's liability for servant's torts, enticement, interference with service, labor unions, strikes, boycotts, arbitration, union labels, constitutionality of enactments. The scope is obviously wide; but the preface conscientiously points out that "except in so far as they illustrate general principles, the cases which are concerned with the hiring of seamen and of persons in public employments have not been reviewed in this treatise."

The text and notes cover more than ten thousand pages. It would be wholly unjust to infer that the vastness of the work has been brought to pass by excessively large type, unnecessarily wide margins, or other dishonest devices. No; this is in all respects an honest enterprise. The size of the work is due partly to the number of topics treated in the text, and partly — indeed principally — to the exhaustiveness of the annotation.

As the notes are the peculiarly conspicuous feature, and perhaps the one for which the practitioner will be chiefly grateful, they deserve attention first. They are planned to collect all the pertinent cases, and to present most of them in such a way as to enable the reader to determine their value for his immediate needs, the facts being frequently stated and an extract from the opinion being usually reprinted. The careful brief-maker, it is true, will continue to search the digests and to read many cases in full; but unquestionably such annotation as is found in these volumes will encourage many to reduce that old-fashioned thoroughness of research to a minimum. It is certainly no fault of this treatise that it has been so well planned and executed as to tempt the reader to neglect part of his own professional duty.

It only remains to add as to the footnotes that they give the dates of the cases and appear to have grown up in the process of preparing annotations for the well-known series entitled "Lawyers' Reports Annotated."

The work fully deserves to be designated by its chosen title of commentaries. The text is indeed an original and thoughtful exposition of legal doctrine, based upon the cases cited in the footnotes. The preface says that "a commentator should show not merely what the courts have decided concerning certain states of fact, but also the principles to which their decisions have been referred and the reasoning upon which their conclusions have been based," and that "there is only one method by which this object can be attained — that is to say, by keeping the reader constantly in touch with the actual language which they have used." The reader, however, is happily disappointed. The opinions of the judges are severely restricted to the footnotes, and the text is almost wholly free from quotations. Thus the work does not dodge behind the words of judges or of text-writers, but with honest industry re-states the law, discusses its reasons and points out distinctions.

Almost everywhere the discussion is enlightened and enlightening. This will be no surprise to readers of the preliminary edition, — the two stout volumes which appeared in 1904 and which may be found, in a revised form, in the fourth and fifth volumes of the present still larger work. In that earlier edition a frank attack was made on the fellow-servant rule, several years before workmen's compensation acts began to sweep over the United States and to demon-



strate that the fellow-servant rule has not as many friends as has been imagined.

The most interesting part of the present edition is probably the sixth volume, which deals principally with the master's liability for the servant's torts. It is here that the careful and original — though not improperly original — analysis which is an attractive feature of the greater part of the work is found at its best.

Unfortunately, but naturally, the first volume does not give an adequate conception of the quality characteristic of almost the whole of the work. The difficulty is that the work almost necessarily begins with some topics which have not yet received adequate attention and which, partly because they are not of the greatest practical importance, still are befogged by repetition of customary phrases. Thus, this work begins with "relation and contract" but does not explain with clearness to what extent the relation necessarily involves a contract or is independent of a contract and even of contractual capacity; and this matter is not wholly cleared up when the topic is later (Chapter IV) treated in greater detail. Indeed, compliance with the profession's habit of calling the relation of master and servant a contract causes awkward language here and there throughout the whole work. Thus (p. 6842) it is said that "a complainant who seeks to recover on the ground of a parent's vicarious liability must allege facts sufficient to show that a contract of employment existed between the defendant and the child in question." Again, although near the beginning of the work the test of the existence of the relation is more than once (pp. 9, 230) said to reside in the right to have control, it is in another place (p. 10) said to reside in the exercise of such control — although the actual exercise of control is clearly a very different matter from the mere right to exercise it. Still again, the distinction, if any, between servants and agents is left obscure (Chapter III).

However, as has been indicated, these matters, though interesting to persons of a scientific turn, are of slight practical importance. Perhaps it is somewhat better worth while to notice that in one of the most valuable parts of the work (Chapters LXI-LXIV) the discussion of the fellow-servant rule and the judicial limitations placed upon it, to which allusion has already been made, this edition, like its predecessor, makes the rather confusing attempt to apply the familiar title of vice-principal to both the moribund doctrine of superior servants and the growing doctrine as to suitable appliances and the like. The term has been so long almost monopolized for the superior servant doctrine that to give to it a new signification seems to invite inevitable and unnecessary ambiguity.

Yet why seem to emphasize points which, however well taken, do not essentially impair the practical usefulness of this vast undertaking? Here are ten thousand pages devoted honestly and intelligently to aiding the practitioner in his search for doctrine and authority; and in the domain covered the work is indispensable.

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SELECT CHARTERS OF TRADING COMPANIES, A. D. 1530-1707; being Vol. 28 of the Selden Society Publications. Edited by Cecil T. Carr. London: Bernard Quaritch. 1913. pp. cxxxvi, 322.

This interesting volume contains an excellent selection of hitherto unpublished charters, including the first charter of the Levant Company (1600); the African Company (1618); the New River Company (1619), which continued to supply London with water until it was taken by the municipality a few years ago; the York Buildings Concession (1675), chartered as a water company, but later to undertake great speculations in forfeited Scotch lands; the Fire

Office (1688); the Hollow Sword Blades Company (1692), chartered as a manufacturing company, sold to a company of merchants who used it to speculate in forfeited Irish lands; the Royal Lutestring Company (1692); the Amicable Society (1706), an insurance scheme; and the Charitable Corporation (1707).

The Introduction is a valuable contribution to industrial history, and especially to the history of industrial corporations. The origin of the trading corporation was the patent of monopoly. This was given, legitimately, in return for a genuine contribution to the prosperity of the realm: the discovery of new lands, the introduction of a new manufacture, a new mechanical invention, or even a good scheme for the regulation of a trade. But the patentee desired incorporation, for several reasons. Incorporation was a protection against the claim of illegality; it allowed perpetual succession, so that dissolution of the business would not follow from the death, and especially from the bankruptcy, of a member; it permitted the bringing together of a large joint stock, which could not be provided by one or two men; finally, it offered freedom from personal liability. Events showed, also, that corporate monopoly fared better at the hands of Parliament than personal monopoly. "Into the framework which contained gild and borough, mercers and merchant venturers, it was a simple matter to fit the chartered companies." Small wonder, therefore, that they flourished until the bubble burst, and that they continued in existence, though with diminished prestige, until the modern joint-stock company superseded them.

The editor examined in detail several of the important earlier companies and the history of patents for invention, of monopolies, of companies for colonization, mining and fishing, of industrial, banking, insurance and water companies and the South Sea company. The introduction is good law, good history and good reading.

J. H. B.

**GREAT JURISTS OF THE WORLD.** Edited by Sir John MacDonnell and Edward Manson, with an Introduction by Van Vechten Veeder. Boston: Little, Brown and Company. 1914. pp. xxxii, 607.

This volume of the Continental Legal History Series is devoted to biographies of twenty-six selected jurists whose lives extend over a period of two thousand years, from Gaius to Von Ihering. The great scope of the book subjects it to some disadvantages; many great names are necessarily omitted, and the treatment of each one who is included is necessarily brief. This brevity occasionally makes a chapter seem a little too much like a mere catalogue of achievements and writings, the character of which is left unexplained to a reader who has not considerable knowledge of the history of jurisprudence. In places, therefore, the book is not easy reading. Nevertheless, the task was well worth attempting, and in view of the inherent difficulty of comprising in one volume essays devoted to so many men of different periods and nationalities as to some of whom few biographical details are obtainable, it has been well done.

S. W.

**PRIVATE INTERNATIONAL JURISPRUDENCE.** By John Alderson Foote. Fourth Edition. Edited by Coleman Phillipson. London: Stevens and Haynes. 1914. pp. xlv, 595.

**A HANDBOOK OF STOCK EXCHANGE LAWS.** By Samuel P. Goldman. Garden City, N. Y.: Doubleday, Page and Company. 1914. pp. ix, 290.



LETTERS ON WAR AND NEUTRALITY. By Thomas Erskine Holland. Second Edition. New York: Longmans, Green, and Company. 1914. pp. xii, 203.

PHILOSOPHY OF LAW. By Josef Kohler. Modern Legal Philosophy Series. Vol. XII. Translated by Adalbert Albrecht. Boston: The Boston Book Company. 1914. pp. xlv, 390.

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## LEGISLATIVE DIVORCES AND THE FOURTEENTH AMENDMENT.

PRIOR to the adoption of the Fourteenth Amendment to the Constitution of the United States, it was the prevailing opinion of lawyers and courts that state legislatures could grant divorces *a vinculo* when the constitution of their state did not forbid, at least for causes for which they could not be granted by the courts.

Marriage was viewed as creating or entailing a legal *status*. The law produced the *status*, and the law could terminate it. The voice of the state was its law, whether pronounced by the legislative or the judicial department, so long as each acted in its proper sphere.

The history of the common law supported this doctrine. Great Britain had, during a course of centuries, granted divorces occasionally by act of Parliament. They had been confined to cases of adultery; but such a limitation was in its nature purely a matter of legislative discretion.

The Supreme Court of the United States in 1887 supported (though two of its ablest members dissented) a divorce given by one of our territorial legislatures. The law under which the territory was organized vested it with legislative jurisdiction over "all rightful subjects of legislation." English and American practice, the court said, had settled it that to grant a divorce *a vinculo* was a proper act of legislation, at least where no jurisdiction



to grant one under similar circumstances had been vested in the judicial tribunals.<sup>1</sup>

The general current of state decisions runs in the same direction, although a few are to the contrary.<sup>2</sup>

The number of legislative divorces granted in the various states has been very large, but of late years it has been much reduced by new provisions in our state constitutions or statutes. For the five biennial sessions of the Delaware legislature, from 1889 to 1897 inclusive, it is stated in a recent book that there were over three hundred of them, the last year of the period being the most prolific, and showing a round hundred.<sup>3</sup> Ten years later, by a statute of 1907, divorces in all cases were turned over to the courts.<sup>4</sup> In Missouri, in one year, the legislature granted fifty-five divorces, although the courts had been given quite a broad divorce jurisdiction.<sup>5</sup> Pennsylvania had at one time a standing legislative Committee on Divorce, which heard petitions for divorce, much as a court might. In that state the court took the explicit position that notice of a divorce proceeding pending in, or brought to, the legislature need not be given to the adverse party. The power to give relief, it said, was legislative, and so "the judicial quality of the Act is merged. Notice becomes unnecessary, because it is a law, and not a decree."<sup>6</sup>

It seems difficult, on principle, to treat a legislative divorce as invalid, where the legislature had previously given the courts jurisdiction over divorces for certain causes, or even exclusive jurisdiction as to such causes; and yet as valid, if the courts had received no such grants. Professor Howard, in his *History of Matrimonial Institutions*, asserts such a distinction,<sup>7</sup> but his main authority for it is the divorce practice in Connecticut. As shown by him, legislative divorces were numerous in that state down to 1850. In 1843, for instance, there were thirteen; in 1847, seven;

<sup>1</sup> *Maynard v. Hill*, 125 U. S. 190, 205, 206, 8 Sup. Ct. 723 (1888). See, however, 1 *Bishop on Divorce*, § 661.

<sup>2</sup> *Bryson v. Bryson*, 17 Mo. 590 (1853).

<sup>3</sup> *Keezer on Marriage and Divorce*, 418.

<sup>4</sup> *Laws of Delaware*, xxiv, 621.

<sup>5</sup> *Page on Divorce*, 58, note, as cited, in 1 *Bishop on Marriage and Divorce*, p. 500, note.

<sup>6</sup> *Cronise v. Cronise*, 54 Pa. St. 255, 262 (1867).

<sup>7</sup> II, 359.

in 1848, fifteen; and in 1849, eighteen. In the latter year a different policy was adopted for the future. The Superior Court was given "sole and exclusive jurisdiction of all petitions for divorce," and several new causes of divorce were added, one being "any such misconduct of the other party as permanently destroys the happiness of the petitioner and defeats the purpose of the marriage relation."<sup>8</sup> Notwithstanding this, the General Assembly, at its next session, granted a divorce, and occasionally exercised the same jurisdiction for the next sixty years. The causes of divorce were very rarely stated in the final Act. In a majority of the cases, probably, it was insanity existing previous to the marriage, but this was treated as strictly a cause of divorce, and not of a judgment of nullity. Nor had it, from 1831 (when *Starr v. Pease*, 8 Conn. 541, was decided) to 1911, been regarded as an intrusion on the judicial field for the legislature to grant such relief in any case where it deemed it proper. Each Act of divorce, if inconsistent with the Act of 1849 giving exclusive jurisdiction in divorce suits to the courts, was supported as a later law, granting exceptions from a former one.

At the time of the adoption of the Fourteenth Amendment to the Constitution of the United States, in 1868, its far-reaching scope was not generally understood or, at least, not generally admitted. The Supreme Court of the United States was at first indisposed to give it all the effect which its terms naturally called for, and, had the opinion expressed in the *Slaughter House* cases<sup>9</sup> not been virtually overruled in later decisions, the amendment would have been of little avail to any but the negro. So far as the writer is aware, no court has yet been asked to consider its effect on legislative divorces.

The clause of most importance in this respect is that forbidding any state to "deny to any person within its jurisdiction the equal protection of the laws."

In *Yick Wo v. Hopkins*,<sup>10</sup> this phrase — "the equal protection of the laws" — was defined as meaning "the protection of equal laws." This would seem to preclude a state, whose courts have gen-

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<sup>8</sup> Public Acts of 1849, 17.

<sup>9</sup> 16 Wall. (U. S.) 36, 81 (1872).

<sup>10</sup> 118 U. S. 356, 369, 8 Sup. Ct. 1064 (1886).



eral jurisdiction to grant divorces for certain causes, from singling out, by a special law, a particular couple who are united in the marriage relation, and divorcing them for another cause, or, indeed, for any cause. Here would be a general law for all, and a special law for two named individuals. If a man sued in court for a divorce, it could be obtained only by a decree of a judicial tribunal, before which his wife must be summoned, and where she could be heard in her own behalf. If the special law be valid, he could sue before the legislature without notifying her, and secure the divorce when she had no knowledge of the proceeding and no opportunity to appear in opposition. The *status* of no one else in the general class of married women could be varied by her exclusion from that class without her having the benefit of a judicial hearing. The *status* of the one particular woman, from whom her husband was freed by special legislative action, would be altered in a manner much less apt to secure her just rights.

The ordinary married person has by law, in almost every state, a conditional immunity from divorce. None can be granted, according to that law, save by a court. If any particular married person can be singled out by the state and freed from the bond of matrimony, without any court proceeding, the conditional immunity belonging to every other married person is denied.

The protection of equal laws cannot be enjoyed by one against whom the power of the state is exerted to alter his *status* in a particular manner not contemplated or permitted by such laws, as respects persons in general.

The guaranty in the Fourteenth Amendment against discrimination by the state is for the benefit of "any person within its jurisdiction." As a legislative divorce, if valid, operates as a law, and as the general proposition is true that laws can be made without notice to those who will be affected by them, it was the former American doctrine that such a divorce proceeding could be maintained where one party to the marriage was domiciled in the state where it was had, though the other was domiciled elsewhere and did not have notice or appear.<sup>11</sup> So far, however, as the Four-

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<sup>11</sup> *Maynard v. Hill*, 125 U. S. 190, 209, 8 Sup. Ct. 723 (1888). Congress, in 1886, forbade territorial legislative divorces for the future. U. S. STAT. AT LARGE, xiv, 170.

teenth Amendment operates on personal rights and matters of *status*, it can hardly be claimed that it protects no one who is not personally within the territory of the state. Should a state deny to such a person, who is not one of its citizens, the equal protection of its laws, by changing his *status*, both in respect to one of its citizens and to the community, it assumes to have jurisdiction over him by that very denial. If the proceeding has any force whatever, it is because of this assumption, and if a non-resident is thus swept into the *de facto* jurisdiction of a legislature, he certainly comes within the spirit of the amendment.<sup>12</sup>

In 1911 the legislature of Connecticut granted a divorce on the husband's petition. The wife had become incurably insane since her marriage. The divorce was not to take effect until he gave a bond, with surety for \$1500, to the town where he lived, conditioned for her partial support. The Superior Court had no power to grant divorces for the cause of supervenient insanity. The Governor returned the bill without his approval, and his veto, which was mainly based on the provisions of the Fourteenth Amendment, was sustained. Adverse reports have been made on all subsequent applications for divorces made to the legislature in 1911 and 1913.

The doctrine of *Maynard v. Hill*<sup>13</sup> was explained in *Haddock v. Haddock*<sup>14</sup> as only affirming that a legislative divorce of a domiciled citizen was valid within the jurisdiction of the government which granted it. Other states were free to recognize it as effectual or not.

It is certain that it would not be entitled to their recognition under the generally accepted rules of international private law.<sup>15</sup>

In *Maynard v. Hill*<sup>16</sup> the effect of the Fourteenth Amendment on the states was not in question. It was a question purely of the rights of the United States, exercised through one of its political

<sup>12</sup> See, however, *Blake v. McClung*, 172 U. S. 239, 261, 19 Sup. Ct. 165 (1898); 176 U. S. 59, 65, 20 Sup. Ct. 307 (1900).

<sup>13</sup> *Supra*.

<sup>14</sup> 201 U. S. 562, 569, 574, 26 Sup. Ct. 525 (1906).

<sup>15</sup> See Wharton on the Conflict of Laws, 3 ed., I, § 237, f; *Convention pour régler les Conflits de Lois et de Juridictions en Matière de Divorce et de Séparation de Corps*, Art. 7.

<sup>16</sup> *Supra*.



agencies — a territorial government — and affecting landed property situated in the territory.

The whole drift of modern institutions is away from unconfined legislative power. The grant of legislative divorce is one of the extremist forms which it can assume. It does not belong to the social life of the twentieth century.

*Simeon E. Baldwin.*

NEW HAVEN.

## GENERAL POWERS AND PERPETUITIES.

IT is a familiar rule that a limitation of a future interest in property that restrains the owner from alienating the property absolutely is not valid unless it is to vest, if at all, within the legally prescribed period from the time when the instrument containing the limitation takes effect. This period is fixed by the duration of a life or lives then in being and twenty-one years afterwards. If the person or persons to whom the limitation is made, or the extent of their interests, are to be ascertained by a subsequent appointment, a literal application of the rule so expressed would make it necessary in all cases to compute the time as if the appointment had been written into the original instrument containing the limitation, for, until the appointment is made, the limitation is incomplete. But, as the object of the law's anxiety against perpetuities is the restraint of alienation, Lord St. Leonards says, "an important distinction is established between general and particular powers."<sup>1</sup> He proceeds as follows:

"By a *general power* we understand a right to appoint to whomsoever the donee pleases. By a *particular power* it is meant that the donee is restricted to some objects designated in the deed creating the power, as to his own children. A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases; he has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes may lead him to do so. . . . Therefore, whatever estates may be created by a man seised in fee may equally be created under a general power of appointment; and *the period* for the commencement of the limitations, in point of perpetuity, is the time of the *execution* of the power, and not of the *creation* of it."

These views had been previously expressed by Mr. Butler in his notes to Coke upon Littleton,<sup>2</sup> and the only dissent from them

<sup>1</sup> Sugden on Powers (8 ed., 1861), 394, 396.

<sup>2</sup> Coke upon Littleton, 271 b (note 231, VII, 2) ; 379 b (note 330).



came from Mr. Powell in his notes to the 4th edition of Fearn's *Executory Devises* in 1795.<sup>3</sup> He asserted that, where the disposition was merely an exercise of the power, capable of taking effect by virtue of the power only, the principle, "that the uses limited by the power must be such as would have been good, if limited by the original deed," applied with equal force to a general, as to a particular, power; for, if it were otherwise, such general power of appointment might, in the execution of it, have the same tendency to a perpetuity as a particular power. He illustrated this as follows:

"Thus if A. owner of an estate in fee simple in lands, were to limit them to the use of such person or persons (*generally*) for such estate or estates, &c. as he (A.) should appoint, and in the mean time, and subject to such power, to the use of B. in fee; and then A. exercised his power in favour of C. a person unborn at the time of the creation of the power for life, remainder to his first and other sons in fee, so as to make the sons of C. take by purchase, he would thereby be enabled to tie up the property beyond the period of a life in being, and twenty-one years after, computed from the time at which the instrument creating the power bore date."

But he added that the inconvenience of a perpetuity would be avoided where the general power of appointment and the legal estate were vested in the same person by the deed creating the power and limiting the legal estate.

Lord St. Leonards referred to this contention<sup>4</sup> and, after quoting the words of the illustration, observed that

"neither with regard to the limitations themselves, nor to the estate limited in default of appointment, is there any objection whatever on the ground of perpetuity. In regard to the limitations, they are merely such as a man seised in fee might create; and, as the power is equivalent to the fee, the same estates may be created by force of both. To take a distinction between a general power and a limitation in fee, is to grasp at a shadow whilst the substance escapes. By the creation of the power, no perpetuity, not even a tendency to a perpetuity, is effected. The donee may sell the estate the next moment; and when he exercises the power in strict settlement as if he were seised in fee, he creates those estates only which the law permits with reference to the time at which they were raised."

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<sup>3</sup> 2 Fearn, *Executory Devises*, 4 ed., 375, 376.

<sup>4</sup> Sugden on Powers, 395-396.

The law stood in this way until 1869, when a distinction was for the first time made by James, V. C., in respect of a general power exercisable only by will in the case of *In re Powell's Trusts*.<sup>5</sup> A testator had bequeathed £5000 in trust for his daughter, Mrs. Hall, for life and after her death for such persons as she should appoint by will. The daughter by her will appointed the fund upon trust for her daughter (who was unborn at the testator's death) for life, and afterwards for her daughter's children. As to the validity of the trusts after the death of Mrs. Hall's daughter, James, V. C., said:

"A general power to be exercised at death does not constitute ownership. The money was tied up during the whole of Mrs. Hall's life. The rule of perpetuities, therefore, does apply. Where a general power is equivalent to ownership the rule of perpetuities does not apply; but here the money is tied up during the life of the donee."

This is the whole of the judgment upon this point as given in the Weekly Reporter, and the report in the Law Journal is to the same effect more shortly expressed. The only reason mentioned for the decision is that the money was tied up during the whole of Mrs. Hall's life. But that is no reason at all, for the law allows property to be tied up for one life. It might as well be said, if the power had been to appoint by deed after she attained the age of 50 years, that the money was tied up for so many years. If the decision was right, the reasons must be found elsewhere than in the judgment.

The correctness of this decision was attacked in *Rous v. Jackson*,<sup>6</sup> in which the same question arose in 1885 and was examined by Chitty, J. He referred to Sugden on Powers and said: "He draws no distinction between a power exercisable by deed or will or by will only, and it appears to me to make no difference by what instrument the power is made exercisable." He also referred to Butler's note in Coke upon Littleton, and said that he thought there must be some slip in the decision in *In re Powell's Trusts*, and that the case was wrongly decided. The appointment was therefore held to be valid.

<sup>5</sup> 18 Wkly. Rep. 228; 39 L. J. Ch. 188 (1869).

<sup>6</sup> 29 Ch. D. 521; 54 L. J. Ch. 732; 52 L. T. 733; 33 Wkly. Rep. 773 (1885). The counsel were Rigby Q. C., and Stirling (both afterwards Lord Justices) on one side, and Macnaghten, Q. C., (afterwards Lord Macnaghten) and Whately, on the other side.



Later in the same year in *In re Flower*,<sup>7</sup> the question was again considered by North, J., who said that he should follow the decision in *Rous v. Jackson*, as the observations of Lord St. Leonards in his book on Powers seemed to be exactly in point and to bear out that judgment. He added that, apart from that decision, if he had to decide the question for the first time, without the assistance of any previous decision on the point, he should decide as Chitty, J., did, and not as was decided in *In re Powell's Trusts*.

A few years afterwards the question was again debated at length in Ireland in *Stuart v. Babington*,<sup>8</sup> and Chatterton, V. C., said that he would not, as he might, content himself with saying that he followed the later cases, but he had carefully considered the cases, and his opinion entirely coincided with those of Chitty, J., and North, J.

Mr. Gray, in the first edition of his book on Perpetuities, which was published in the year following the decision in *Rous v. Jackson*,<sup>9</sup> said that the question was not free from difficulty, but, after mentioning that case, submitted that the earlier case of *In re Powell's Trusts*<sup>10</sup> was correct.<sup>11</sup> In the second edition, published in 1906, he says that "*principle* as well as the weight of *authority* seems to be with *Powell's Trusts*."<sup>12</sup>

The former Lord Justice Farwell in his book on Powers,<sup>13</sup> speaking of *In re Powell's Trusts*, says:

"This case however stands *alone*, and has been dissented from by [the judges in the three cases above mentioned]. And on *principle* it is submitted that for the purposes of the rule against perpetuities a general power to appoint by will, following a life interest in the donee of the power,—whether the donee be a man or a married woman,—is equivalent to absolute ownership."

We are therefore led to ask what is the principle, and what are the authorities, by which Mr. Gray considers the decision in *In re Powell's Trusts*<sup>14</sup> to be supported.

<sup>7</sup> 55 L. J. Ch. 200; 34 Wkly. Rep. 149 (1885).

<sup>8</sup> 27 L. R. Ir. 551, 556 (1891).

<sup>9</sup> *Supra*, p. 707.

<sup>10</sup> *Supra*, p. 707.

<sup>11</sup> Gray, *Perp.*, 1 ed., pp. 332, 334, §§ 526, 526 b.

<sup>12</sup> Gray, *Perp.*, 2 ed., p. 412, § 526 b.

<sup>13</sup> Farwell on Powers (2 ed., 1893), 287.

<sup>14</sup> *Supra*, p. 707.

The principal authorities referred to<sup>15</sup> are two English cases, *Wollaston v. King*<sup>16</sup> and *Morgan v. Gronow*,<sup>17</sup> and one Irish case, *Tredennick v. Tredennick*.<sup>18</sup> I have to confess my inability to find anything in these cases that relates to the question. In none of them was there any question whether the validity of interests appointed under a power should be referred to the time of the execution of the power or to the time of its creation. The point determined in each of them was that the power itself was void for remoteness, because it was given to a person that might not be capable of exercising it within the legal period, and therefore no appointment whatever could be made under it. In *Morgan v. Gronow*,<sup>19</sup> which illustrates them all, a fund was appointed, under a special power in a marriage settlement, in trust for each of two daughters of the marriage for life, both being unmarried at the time, and a general power was given to each daughter to appoint by deed the trusts upon which the fund should be held after her marriage, and, subject thereto, a general power to appoint by will was given to her. Lord Selborne held that the power to appoint by will was void, because, as the daughter was not living at the date of the settlement, nothing could vest in her or her representatives or in any one else under an exercise of the power except at a time beyond the legal limit. He also held that the power to appoint by deed was void, because it was to arise only upon marriage, which was an event as uncertain as regards the time at which it might take place as death was. No question therefore arose, or could arise, as to the extent to which the general power to appoint by will might have been exercised, if it had been a valid power.

This was pointed out with great clearness in an article in this Review by Mr. Kales.<sup>20</sup> In a subsequent article written by Mr. Gray<sup>21</sup> in answer to it, no attempt seems to have been made to show how the decision in *In re Powell's Trusts*<sup>22</sup> derives any support from these cases. Mr. Gray, however, says that it is not right to say that the power given to the unborn person was void for

<sup>15</sup> Gray, *Perp.*, 2 ed., p. 412, § 526 a.

<sup>16</sup> L. R. 8 Eq. 165 (1868).

<sup>17</sup> L. R. 16 Eq. 1, 9-10 (1873).

<sup>18</sup> [1900] 1 I. R. 354. This case was decided by Chatterton, V. C., who also decided *Stuart v. Babington*, 27 L. R. Ir. 551; *supra*, p. 708.

<sup>19</sup> *Supra*, p. 707.

<sup>20</sup> 26 HARV. L. REV. 64, 69 (Nov., 1912).

<sup>21</sup> 26 HARV. L. REV. 720 (June, 1913).

<sup>22</sup> *Supra*, p. 707.



remoteness, because remoteness can be attributed only to an estate or interest, and, as a power is neither, remoteness is not properly to be predicated of it. It is true, he says, that no appointment under a power which may be exercised beyond the legal limit is good, but the reason is that the vesting of an interest appointed under a power is subject to the condition precedent of the power being exercised, and, if the power can be exercised beyond the legal limit, the condition may be fulfilled beyond the limit, and therefore the *interest* appointed under the power will be too remote. But whether it is more correct to say that the power was void for remoteness or because it was subject to an impossible condition, these cases only determine that the power was of no effect and that no appointment whatever could be made under it, and they do not touch the question what interests could have been appointed under a valid power given to a living person to appoint by will in any manner that he might think proper.<sup>23</sup>

It is not suggested that there is any other English authority that gives any support to the decision in *In re Powell's Trusts*.<sup>24</sup>

As to the American cases referred to, the principal one is a New York case, *Genet v. Hunt*,<sup>25</sup> in which the validity of a disposition under a general power of appointment by will was referred to the date of the deed creating the power. But the decision proceeded upon the statutes of New York, which had expressly abolished powers as they previously existed and made new provisions regarding them and which had been decided to constitute a complete and exclusive code on the subject.<sup>26</sup> The judgment, after declaring

<sup>23</sup> It seems to me that it is entirely correct to say, in accordance with the usage, that a power is void for remoteness in such cases (Marsden, *Perpetuities*, 234; 1 *Jarman on Wills*, 6 ed., 390-310), even though remoteness may affect only an estate or interest. A power is only a part of the limitation contained in the instrument creating the power, and is usually so expressed, *e. g.*, as in *Morgan v. Gronow*, L. R. 16 Eq. p. 3, "and after her decease should hold the said investments . . . upon such trusts as she should by will appoint." If the trusts will not necessarily be ascertained by an appointment to be made within the legal period, if at all, this limitation is void for remoteness, and the power, being part of the limitation, falls with it.

<sup>24</sup> *Supra*, p. 707. See also 1 *Jarman on Wills*, 6 ed., 321 (1910); 22 *Halsbury's Laws of England*, 356 (1912).

<sup>25</sup> 113 N. Y. 158, 170; 21 N. E. 91 (1889).

<sup>26</sup> *Cutting v. Cutting*, 86 N. Y. 522, 537 (1881), where it was held that the exercise of a general power of disposition by will did not make the property liable for the payment of the testator's debts, as at common law, because the power, although general, was not absolute according to the statute, which defined an absolute power as

this to be "the rule of our statute," adds that Mr. Jarman explains why this test is not applicable to appointments under general powers at common law, and it then quotes, as a statement "by Mr. Jarman," a passage added by the editor of the fourth edition of Jarman on Wills,<sup>27</sup> which gives the substance of the decision in *In re Powell's Trusts*,<sup>28</sup> Mr. Jarman himself having died nearly ten years before that decision. The judgment also mentions that *Rous v. Jackson*<sup>29</sup> "seems to be adverse" and gives what the judge understood to be the view taken by Mr. Gray as to the error on which this case was supposed to proceed. As the decision of the New York court went entirely upon the statute, these general observations have no special importance.

In Pennsylvania, in *Lawrence's Estate*,<sup>30</sup> the question did not arise, but the judgment contains some dicta that, although the question was not free from doubt, the better opinion seemed to be that the time must be measured from the creation of the power, referring only to *In re Powell's Trusts*, and Mr. Gray's book at § 526. It was held, however, that, assuming this to be the rule, the interests appointed under the power were all valid. In the later case of *Boyd's Estate*<sup>31</sup> some of the interests appointed were held to be invalid, as the persons might not come into being within 21 years after the death of the donee of the power, but the question was not discussed and was apparently decided on the authority of the dicta in the previous case, which was referred to.

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one that enabled the grantee in his lifetime to dispose of the fee for his own benefit and provided that when such a power was given to the owner of an estate for life or years, such estate should be changed into a fee, absolute as to creditors and purchasers. As to other peculiar and arbitrary provisions of the New York statutes relating to estates and remoteness, see Mr. Gray's book, 2 ed., §§ 747, 749.

<sup>27</sup> 1 Jarman on Wills, 4 ed., 5 Am. ed., 290, where the passage is distinguished from the author's work by brackets. The passage was omitted in the 5th ed., 6th Am. ed., p. 261, and another substituted, stating that it had been held that the same principle applicable to appointments under general powers applied where the power was to be exercised by will only, and citing the later cases. In a note it was added that *In re Powell's Trusts*, *contra*, seemed inconsistent with the course of authority. Mr. Jarman died in February 1860 (4 Sol. J. 351; 9 L. Mag. & Rev. 189).

<sup>28</sup> *Supra*, p. 707.

<sup>29</sup> *Supra*, p. 707.

<sup>30</sup> 136 Pa. 354, 364-5; 20 Atl. 521 (1890). In the opinion of the court in this case there is the same mistake in referring to *In re Powell's Trusts* in 37 (instead of 39) L. J. Ch. 188, as there is in Mr. Gray's book, § 526.

<sup>31</sup> 199 Pa. 487, 493; 49 Atl. 297 (1901).



In Maryland, it was laid down in *Thomas v. Gregg*,<sup>32</sup> that it had always been held without question that a limitation under a power of appointment must be construed as if it had been inserted in the instrument creating the power, as regards the rule against perpetuities, and this case, as well as the earlier case of *Albert v. Albert*<sup>33</sup> and the later one of *Reed v. McIlvain*,<sup>34</sup> was decided according to that rule without any suggestion of a possible difference between general and special powers or between general powers exercisable by deed and those exercisable only by will.

The principle upon which Mr. Gray relies, as stated by him in § 526 *b* in the second edition of his book, is that, when the donee of the power can exercise it by either deed or will, he can at any time appoint to himself, and therefore is practically the owner, but, when the power can be exercised only by will, he cannot appoint to himself, for he must die before the appointment can take effect, and therefore he is not practically the owner. He says that an exception to the strict operation of the rule is made in the former case, because the donee can at any time appoint to himself, and that the general rule must govern unless the exception is made out, which is not done unless there be a present right to acquire the present absolute interest. He illustrates the application of the principle by the following example:

"Take, for instance, a devise by A. to B. for life, remainder as B. shall by will appoint, and B. appoints to C., who was not born when A. died, for life, remainder to such of C.'s issue as survive him. . . . Such a gift to C.'s children would be bad."

This is substantially the same example as that used by Mr. Powell,<sup>35</sup> to show that such an appointment to C.'s children under a general power, where there was no restriction as to the manner in which the power should be exercised, would create a perpetuity, unless the legal estate was vested in the same person as the power. But Lord St. Leonards said that there was no perpetuity or tendency to a perpetuity, and that "to take a distinction between a general

<sup>32</sup> 76 Md. 169, 174; 24 Atl. 418 (1892).

<sup>33</sup> 68 Md. 352, 372; 12 Atl. 11 (1888).

<sup>34</sup> 113 Md. 140, 146; 77 Atl. 329 (1910); referred to in Mr. Gray's article, 26 HARV. L. REV. p. 725, note.

<sup>35</sup> 2 Fearn, Executory Devises, 4 ed., 376; *supra*, p. 706.

power and a limitation in fee is to grasp at a shadow whilst the substance escapes." How, then, is a perpetuity created by the same limitation when it is contained in the will of a person who has a general power to appoint by his will to whomsoever he pleases?

The principle stated by Lord St. Leonards is that whatever estates may be created by a man seised in fee may equally be created under a general power of appointment, and therefore, in point of perpetuity, the time of the *execution* of the power, and not of the *creation* of it, is to be regarded, the law's anxiety against perpetuities being the restraint of alienation.<sup>36</sup> This applies with the same force to a general power of appointment by will, as to a like power of appointment by deed, for every estate or interest that could have been created by the absolute owner may be created by an exercise of the power of appointment by will. The power enables the donee to give the property to any person or for any purpose. He may by his will bring it into the market at once and direct that it be sold for payment of his debts, or he may mix it, or the proceeds, with his own property and put it in the same course of devolution as if it had been actually vested in him as his own property at the time of his death. He may do this so completely that he is said to make the property his own by his will.<sup>37</sup> His power over it is so absolute that, if he exercises the power at all in favor of any person or object, he thereby makes the property to that extent liable for his debts and engagements as if it had been his own, although that result may be contrary to his wishes.<sup>38</sup> It is plain that there is no restraint of alienation, when the power of alienation is so unrestricted.

Mr. Gray has mistaken for a principle a mere incident of the exercise of the power when the donee exercises it by deed in his lifetime. He may then appoint to himself, and he cannot do this by his will, which takes effect only at his death. But this arises from the nature of things and not from any restriction of the power of disposition. When his will takes effect, there is one person less in existence than there was the moment before he died, and that

<sup>36</sup> Sugden on Powers, 395, 396; *supra*, p. 705.

<sup>37</sup> *Coxen v. Rowland*, [1894] 1 Ch. 406, 410, 412; *In re Hadley*, [1909] 1 Ch. 20, 31, 35; *Minot v. Treasurer General*, 207 Mass. 588, 591; 93 N. E. 973 (1911).

<sup>38</sup> *Lord Townshend v. Windham*, 2 Ves. 1, 2, 11 (1750); *Clapp v. Ingraham*, 126 Mass. 200 (1879); Sugden on Powers, 474.



is the only thing that limits his power of appointment, and the death of any other person before the exercise of a power prevents in the same manner an appointment to that person, whether the power is exercisable by deed or will.<sup>39</sup> There is however no restraint of alienation when the power of disposition extends to all persons in existence at the time of the exercise of the power or afterwards born.

There is no statement of the principle that confines it to cases where the power may be exercised by deed or by either deed or will, and in the language used by Lord St. Leonards and Mr. Butler there is no suggestion of a distinction where the power is exercisable only by will. They may use, as examples to illustrate the working of the principle, cases where the power was exercisable by deed as well as by will, but these examples can be readily adapted by a proper change of expression to cases where it is exercisable only by will, in the same manner as they may be adapted to personal property where the words apply, as they generally do, exclusively to real property. When Mr. Butler says <sup>40</sup> that a general power "enables the party to vest the whole fee in himself, or in any other person, and to liberate the estate entirely from every species of limitation inconsistent with that fee," he states a principle that is as applicable to dealing with the property as his own by making it a part of his own estate by his will, as it is to a dealing with personal property. There is no distinction suggested in the one case or in the other. The language used by Lord St. Leonards in his examples does not require change to adapt it to an appointment by will. He says, as regards the donee of a general power, that "it enables him to give the fee to *whom he pleases*; he has an *absolute disposing power* over the estate, and may *bring it into the market* whenever his *necessities or wishes* may lead him to do so," and in another passage, "By the creation of the power no perpetuity, not even a tendency to a perpetuity, is effected.

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<sup>39</sup> Under a power to appoint among children by deed or will, no appointment can be made to a child who dies before an appointment to him, although such an appointment might have been made by deed in his lifetime, and although the consequence is that no provision for the child's family can be made by an appointment to his representatives or his issue (*Duke of Marlborough v. Godolphin*, 2 Ves. 61, 78 (1750); *Butcher v. Butcher*, 1 Ves. & B. 91 (1812); Sugden on Powers, 670).

<sup>40</sup> Coke upon Littleton, 271 b (note 231, VII, 2).

The donee *may sell the estate the next moment.*"<sup>41</sup> These phrases do not mean that the donee may bring the estate into the market, or sell it, at any moment before the power arises. If a power is given to him to appoint in any manner that he pleases after his marriage, or after he attains the age of 50 years, he can bring the estate into the market, or sell it, the next moment after that event, but not before. The language certainly includes these cases.<sup>42</sup> In like manner the donee of a general power exercisable only by will may bring the estate into the market or direct its sale immediately after his will takes effect, and it has long been a common practice for him to do so.<sup>43</sup> If there is a distinction between making the estate his own property the instant before his death, and making it a part of his estate the instant after his death, the distinction is of a most shadowy kind.<sup>44</sup>

It is also insisted in Mr. Gray's article<sup>45</sup> that, if property is given to B. for life, with a general power of appointment by will, and he appoints to his son (who was unborn at the time of the gift) for life, and afterwards to his issue living at his death, the property

<sup>41</sup> Sugden on Powers 394, 396. See Phipson v. Turner, 9 Sim. 251 (1838).

<sup>42</sup> See Mr. Kales's article, 26 HARV. L. REV. 66.

<sup>43</sup> 4 Davidson on Conveyancing, 3 ed., 30-33 (common form of will).

<sup>44</sup> At the end of his article (p. 727) Mr. Gray says that, "when English judges and writers speak of a general power, they ordinarily mean powers which can be exercised by deed as well as by will," but he does not mention any instances. I think he is mistaken in this, but no such meaning can be attributed to Lord St. Leonards or to Mr. Butler. They define both a general power and a particular power, and their definition of a general power does not admit any such qualification, and, if it did, then a general power exercisable only by will would not be included in either class of powers. The language of Lord St. Leonards (Sugden on Powers, 394) is set out at the commencement of this article, and that of Mr. Butler is substantially the same. The former also, in the same book, speaking of s. 27 of the Wills Act (which provides that a general devise or bequest of the testator's real or personal estate shall include real or personal estate "which he may have power to appoint in any manner he may think proper," unless a contrary intention appears in the will), says (p. 301): "*General powers* only, therefore, are within the statute, and a general power of disposition is for this purpose deemed equivalent to a fee." It is plain that a general power exercisable only by will is included in these general powers, for a few pages further on (p. 306), he says that, although the expression in the statute, "which he may have power to appoint in any manner he may think proper," is ambiguous, it refers to the *extent* of his power of disposition, and not to the *mode* of appointment, and that it applies although the power is confined to a *will*. It will be observed that, in his definition of a general power, he avoids the ambiguity of the statute and that it is impossible to exclude from it a power to appoint by will only.

<sup>45</sup> 26 HARV. L. REV. 722.



is tied up during the lives of B. and his son, in the same manner as if the power given to B. had been a special power to appoint to his issue. It will be observed that this supposed case of an appointment under a general power is the same as *In re Powell's Trusts*,<sup>46</sup> in which James, V. C., only went so far as to say that the property was tied up during the life of the donee of the power. It is a mistake to go further and to say that it is tied up during the lives of both the donee and his son, because by the general power the donee is enabled to liberate it entirely from all previous limitations and to dispose of it as he pleases. There is nothing that ties the two life estates to one another. But in the case of the special power there is a tie between them, for the donee is only enabled to designate the beneficiaries or their interests within the limits previously marked out by the terms of the power. There is consequently no resemblance between the two cases.

In the same article<sup>47</sup> Mr. Gray, referring to a general power exercisable by deed, asserts with emphasis, indicated by italics, that "*such a power is not really a power at all, but is a direct limitation in fee.*" There is no reference to any authority, which might have given some indication of the sense in which this language was used. If it is taken in its ordinary sense, it is contrary to the commonly received notions on the subject, according to which a general power of appointment by deed does not confer any estate on the donee, and, if it is not exercised, the property does not go as part of his estate on his death, his creditors cannot touch it,<sup>48</sup> and the power cannot be exercised by his will.<sup>49</sup> But, if it is only intended to say that such a power is equivalent to a fee so far as regards the power of disposition in his lifetime, then it is no more than is true of a like power of appointment by will, so far as relates to the power of disposition at his death. One cannot help suspecting that this is all he really does mean, for in another part of the same article<sup>50</sup> he says that what is in form an authority to make a limitation is, in substance, a limitation to the donee in fee, because he can appoint to himself in fee, and, when he appoints to anyone else, the effect is the same as if he had first appointed to himself in fee, and then

<sup>46</sup> *Supra*, p. 707.

<sup>47</sup> 26 HARV. L. REV. 724.

<sup>48</sup> *Holmes v. Coghill*, 7 Ves. 499 (1802); 12 Ves. 206, 214 (1806); Sugden on Powers, 474; 1 Story, Equity Jurisprudence, § 170.

<sup>49</sup> Sugden on Powers, 209.

<sup>50</sup> 26 HARV. L. REV. 720-721.

conveyed to that other person. But all this clinging to the idea of actual ownership leaves out of sight the substance of the matter, which is that, if the person having the power, *without* the ownership, may appoint the property to whomsoever he pleases at the time when he exercises the power, he is in the same position, in respect of perpetuity, as if he were actually the owner.

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## THE NEW PHILOSOPHIES OF LAW.

THERE is a visible tendency at the moment to subject this country to an alien philosophy of law. It is openly asserted by politicians and philosophers that the development of the common law is not keeping pace with modern thought, and that the common lawyer has too long neglected those higher conceptions which a modern philosophy of the German socialists alone unfolds. It is the validity of this argument which it is incumbent on us to examine before we give our approval to the kind of philosophy now proposed for our adoption. Many of us are apt to think that a technical subject is beyond our comprehension if it is couched in unfamiliar language peculiar to the subject, or else we take it for granted that because of its obscurity an argument is necessarily profound. There is of course a scientific terminology and a language peculiar to philosophy. Both may be used to advocate unsound as well as sound principles. That the philosophy proposed to us is inadequate and unfitted for our domestic consumption is the single proposition advanced in this paper. Ours is the greatest of republics, with an already long history and an unlimited future. The final philosophy of the law of this great country should find its inspiration here, and not in alien civilizations. The worst that could happen to this country would be that it should lose its firm grasp on the principles which have made it what it is. Our present law is in its essence incomparable and inimitable.

Before considering what is intended by a philosophy of law, let us for a moment consider what is meant by philosophy. Perhaps no other cult is more variously defined by the aristocracy of scholars than philosophy; so true is this that the very latest definition of philosophy proceeds by negation or exclusion, or by demonstrating what philosophy is not, rather than what it is. With English-speaking men philosophy retains the Aristotelian meaning of science in general. In other words, to English-speaking races philosophy is *ἐπιστημὴ ἐπιστημῶν*, or the science of sciences; it is a synthesis of all general doctrines into a universal

doctrine. If we regard science as the systematization of a knowledge of the order of phenomena, then philosophy is the systematization of the conceptions furnished by the philosophical sciences. The German's conception of philosophy differs from that indicated. To him philosophy means a particular transcendental view both of the object of study and of the source of an empirical science, although his philosophy may have the same object and content as an empirical science, provided the study of phenomena is not empirical. The German definition may be the more comprehensive, but just as the conception of the scope of philosophy differs from the Englishman's, so the German's conception of a philosophy of law differs from that of the English or the American lawyer, who regard philosophy as the science of principles furnished by the empirical sciences.

It is doubtless true, as Kant said, that there cannot be two philosophies founded upon principles, as one only can be true. In so far as the content or principles of philosophy are concerned, this is probably an accurate statement. But this statement needs to be supplemented by another, that up to this moment there is no perfect or complete philosophy of all disciplines. We have philosophies of different disciplines or sciences. Then we have philosophies labeled Greek, or a philosophy doubtless influenced by Greek accidents, such as aristocracy and slavery; and we have English, Scottish, Italian, German, and French philosophies, each with its own peculiar mental attitudes, characteristics or national tendencies, however uniform the method and dialectic employed may be. Each makes claims to superiority or universality. As Kant pointed out, each new philosophy must claim to supersede the others or it has no justification. There is a fashion in philosophy just as there is in lesser and more mundane things. The same idea or concept in different heads, German or English, travels very different ways and reaches regions that have little in common.

When the final philosophy arrives it will merge all these national philosophies, with their local accidents and idiosyncrasies, in some great synthesis or harmony which will sound on unchanged forever. But the one final, all-embracing, indisputable synthetic philosophy has not yet come into this world of ours. Before it does come, the contention between the rationalists and the re-



ligious philosophers over the final cause must be settled, as the positivists have given up the ontological quest.

While some positivists do not recognize separate philosophies of empirical sciences, most thinkers do recognize that there is a philosophy for each science. The philosophy of law is the discipline concerned with the doctrines, principles, and conceptions furnished by the science of law. Now it is indubitable that the science of the law of Germany is not the science of the law of English-speaking countries. Law is one thing in Germany, and another in the countries subject to the common law. Therefore a philosophy of the law of England and America is dealing with different juristic phenomena from a philosophy of the law of Germany. If we concede the identities of the two sciences, the philosophy of law would be the same in Germany and in England or America. But as stated, the sciences are not identical. In England and America the science of law is concerned with the juristic phenomena known as positive laws only, or law in position. This was laid down by such thinkers as Hobbes, Bentham, Austin, and Maine, who certainly are comparable to most Germans of the schools. Statute law is positive law, and so is our common law. A judge in common-law countries must decide in accordance with positive law, and when this is defective he must supplement it in accordance with positive law. In Germany this is not true, as the distinction between legislation and juristic application is not kept clear in that country. A different conception of law and of the function and power of a judge is entertained in Germany. The science of law in a particular state is necessarily concerned with those objective phenomena recognized as laws in that state.

In Germany the science of law is concerned with laws not positive, as well as with positive laws, and therefore the legal scientists of Germany go far in search of the origin of law. Their method involves the discussion of origins, then of ethical norms of action, delimitation of interests, economic content of law, and lastly "social justice." Leibnitz, following Plato, long ago, attempted a series of definitions of justice, making justice coextensive with the whole sphere of human duties. But he left "justice" still very obscure, and the philosophy of social justice has made it no clearer. Lasalle well stated that economic forces are abstractions.

But all these concepts mentioned are abstractions, and in England or America are conceived to belong to some other science than law, or else to the philosophy of law. The distinction between a science and a philosophy is that a science assumes certain things as working hypotheses which philosophy submits to a critical analysis. In common-law countries the science of law is concerned only with the objective juristic phenomena known as positive laws, or that law authenticated or enforced by government. There are no working hypotheses in American or English law. Positive law in those countries always connotes political or organic enforcement or authority. If a rule of action is not recognized or enforced by government, it is in England and America not embraced in the science of law. This is generally held by common lawyers, who for a very long period have rarely confused positive law, or the law of the lawyers, with other analogous rules of being or action. In England and America the science of law is confined wholly to the systematic arrangement and knowledge of positive laws, or, in other words, is regarded as an empirical or practical science and is distinguished from a philosophy of law by its empirical content. The science of law ought also to be distinguished from jurisprudence, which is a purely theoretical discipline. But the term "jurisprudence" is so inexact as to indicate very different disciplines. It is rarely used with precision.

Having roughly outlined the essential difference between a science of law and a philosophy of law, let us examine for a moment the contents of the science of the common law. Any general work on the science of law must aim to furnish some systematic arrangement and knowledge of the laws of a country where that law is in operation. Blackstone and Kent, the leading writers on the respective common laws of England and America, to all intent and purpose, furnish a science of law. They arranged their institutes with reference to a scheme or analysis adopted by Hale. Their arrangement or analysis is not scientific, but it is concrete and adapted to law-men. None of the influential codes of the world have been arranged on any scientific plan. The Institutes of Narada of Hindu law, the Twelve Tables, the Edicts of the Prætors, the Codes of Hermogenian, Theodosius and Justinian, each and all lack scientific disposition, and adhere to no strictly logical scheme; but they do not want system such as it is, and the system



chosen had reference to the needs of lawyers and not to the requirements of logicians.

Blackstone's main analysis or arrangement, rights of persons, rights of things (*jura personarum, jura rerum*), so harshly criticised by Austin, has found its ablest defender, I am happy to say, in the "Introduction to Sandar's Institutes of Justinian," by Dr. Hammond, the Chancellor of the Iowa State University. It is evident that Blackstone's analysis is related to his subject, which is the laws of England, and so related that any apprentice may easily comprehend it. While not the most logical, Blackstone's arrangement serves for the familiar exposition of the laws of England. An analytical division of a more logical kind would not be better adapted to the concrete purposes of technical law. Kent deviates somewhat from Blackstone, in his arrangement of the common laws in force in America of the early eighteenth century. But Kent's arrangement also deviates from scientific standards. Both Blackstone and Kent ignore philosophical disquisitions. Their sciences of the common law assume or postulate such elements, as right, justice, sanction, or coercion, leaving the theoretical exposition or critical analysis to the legal philosophers. It is true that Blackstone prefaces his Commentaries with an irrelevant and very inadequate or slight discussion of what he calls the "law of nature" and the "law of revelation," but he very soon reaches *terra firma* when he comes to his definition of the municipal law of England, the real subject of his great work, and he never again refers to either his "law of nature" or his "law of revelation." His "law of nature" is a mere excrescence, which can be entirely omitted without the faintest prejudice to his great work. Unfortunately it enabled his detractors to obscure the extraordinary merits of his work. It was Blackstone, we should remember, who supplied the common law, for the first time, with an accurate legal terminology in the vernacular, and who first gave a lucid exposition of a highly technical and confused subject. What a distinguished service this was to the English-speaking world! It was Kent in turn who first stated authoritatively the common law in force in America and in a manner often superior to Blackstone's.

The analysis or classification of laws by Blackstone and Kent professes to be based mainly on rights. A "right," as conceived by these great common lawyers, is a power or faculty inhering in

some positive law, recognized and enforced by the government through its courts of justice. To common lawyers no other rule engenders a legal "right." Thus they avoid the sophism and equivocation so apparent in the transcendental discussions of "right" by the scientific jurists of some other countries. In this particular, as in all others, the common law shows itself to be a practical system for furthering the convenience of those subject to it. That greatest of German philosophers, Kant, admitted that the question — what is right? — is as embarrassing to the jurist as the question — what is truth? — is to the logician. But he had no reference to England or America. The common lawyer avoids all this embarrassment by his simple and perspicuous definitions of law and right. How would it aid common lawyers to hold, with Schopenhauer, that wrong is the fundamental primary concept, and that the concept of right is the mere negation of wrong? To common lawyers a science of law is a systematic presentation of the knowledge of positive laws. This science is admirably stated and expounded by Blackstone and Kent. The science of the common law as presented by those writers would be only obscured by irrelevant discussions which belong to a philosophy of law. Neither author probably made great pretensions to a profound knowledge of the philosophy of law.

Having considered the province of the science of law, let us turn next to the philosophy of law. According to English and Americans, a philosophy of law is a systematization of the conceptions furnished by the science of the common law. It is a search of first and supreme principles. Under various titles there are numerous writings in the English tongue which are entitled to be regarded as philosophies of the common law. It is unnecessary to resort to the German schools for a philosophy of the common law. All philosophies of the common law are characterized by the peculiar genius which has made the common law one of the two great legal forces of high civilization. Can anyone be so fatuous as to suppose that a people which has displayed such genius for law can at this late stage of development be destitute of a philosophy of law? To prove the contrary it is only necessary to name Hobbes and Locke, two of the brilliant company who have dealt with the philosophy of the common law. English philosophy of law has one great quality: it is animated by a high regard for



individual liberty and respect for individual property — the extension of liberty; this is conceded by the Germans to be the characteristic of the philosophies of the common law. All English and American philosophies of law pursue the objective method, and reject the subjective or metaphysical method, which attempts to frame tenable hypotheses concerning the objective order of things. What is it that the lovers of German philosophies propose to substitute for the admirable philosophies of the common law? Is it the shallow socialistic philosophy of the modern schools? That is the real question for thinking lawyers in this country.

In the development of the legal systems of highly civilized states we should remember that two nations have stood forth far in advance, the Italian Aryans and the English. It has been well said that these people only have combined the moral force and analytical acuteness indispensable for the creation of a great system of law. The peculiar gifts of the Germans, their incomparable fancy, their creative passion and scientific depth, are correctly stated to be hindrances in the formation of law, when these qualities come to be contrasted with the strictly legal and empirical attitude toward law of the Romans and the English. The impulse to build from within outwards, the unswerving love of freedom — in short, all the requisite moral qualities necessary to the creation of a system of law, — are said to have been confined to the two nations just mentioned, and not to have been shared by the Germans. It is from the English colonies we derive our common law. If England had had a reception *en bloc* of Roman law, or if the Romans had not departed forever in the fifth century of our era, the influence of England on the law of the world might have been on a level with the influence of Germany and not equaled that of Rome itself. But fortunately for this country, it was otherwise.

It is very noteworthy that neither Roman nor English legal development has been greatly influenced by philosophy. It has been stated by an eminent philosopher of law that the few passages found in the literature of Roman law, taken from Greek philosophy, have no real connection with the developments of Roman law. A few obscure observations contained in the "De Officiis," the "De Legibus, Libri Tres," and the "Librorum de Republica Sex quae Supersunt" of Cicero, and in the "Corpus Juris" of Justinian have enabled modern theoretical jurists to reconstruct what they

are pleased to term a philosophy of Roman law. The "Corpus Juris" is a splendid but imperfect fragment of Roman law, and more may have been contained in the original sources. What would we not give for the writings from which the Pandects were taken! They would reveal a Roman philosophy of law if one there was. It is certain that the virile features of Roman law were formulated with absolute independence of a critical philosophy, and before the age of the scientific jurists, who followed the end of the republic, there is no trace of a purely scientific method. Until the age of Cicero there is no adequate proof that a philosophy of law was potential in the development of Roman law. Cornelius Nepos, a contemporary of Cicero, distinctly says in the "*De Historicis Latinis*," "*philosophiam, ante eum, incomptam.*" If there ever was a Roman philosophy of law we may be sure that it was the production of the jurists who did not precede Cicero. It has been superbly said that before Cicero the Romans did not think; they acted. In other words philosophy was with the Romans the creature of inaction and a sign of change. In all events, that called Roman philosophy was but a weak paraphrase of the Grecian. As it was in Italy, so in England. From the age of Bracton to that great one of Bacon, Hobbes, and Locke the common law was equally destitute of a philosophy of law, if we except the "*Opusculum de Natura Legis Naturae*" and "*De Laudibus Legum Angliae*" of Fortescue, Hooker's "*Ecclesiastical Polity*," and the "*Dialogus de Fundamentis Legum et de Conscientia*" (Doctor and Student) of Saint Germain, which may be regarded as slight performances in the domain of philosophy.

German philosophy of law is necessarily affected by some accidents or conditions not observable in common-law countries. The extensive reception of Roman law in Germany has had a profound significance on German legal philosophies. The fact that a dead and long misunderstood system of law was forced upon Teutons as a dogma is regarded as a great misfortune for legal development by many Germans. This misfortune affects their philosophies. At an early day only the historical and the exegetical methods were pursued in Germany with great vigor and learning, although Jacques Cujas of Toulouse was probably the predecessor of the entire school of Germans in these methods of approach to Roman law. The historical and the exegetical



methods were not philosophical. The meditations of German jurists, their metaphysical attempts to formulate the ultimate causes of law, and their *a priori* conception that somewhere in the long past there was a certain ultimate reason which made it the duty of all men to accept it and submit to it as law, have greatly affected the science and even the administration of German law. In other words, German law has a philosophical base and German philosophy of law contains a fundamental assumption which makes them very unfit for common-law countries. To formulate rules of law on a method appropriate to ethics or general philosophy is a singular fallacy. I have denoted the radical difference between the German and the English conceptions of law. Let us next glance at the growth of a philosophy of law.

It was only with the development of international law in the sixteenth century that the modern philosophy of law begins. It was essential to international law that it should have a solid base, and this base was first sought in *jus naturae*. From this resort to a law of nature sprang the philosophy of modern law. It comes with ill grace from the would-be disciples of modern German philosophy of law to affect to despise as they do *Naturrecht*, for *Naturrecht* was a first attempt at a philosophy of law. *Naturrecht* did not differ essentially from *normal recht* of later times. Without *Naturrecht* we should have had a much more belated advance to modern philosophy of law. That *jus naturae* was a somewhat inadequate base for a philosophy of law no one now denies, but *jus naturae* served a good purpose before it went into the limbo of abandoned theorems; it led soon to a *priori* discussions of the nature of man.

Wolff may be regarded as the first German to base philosophy on a *priori* principles. In Germany a rationalistic or a *priori* philosophy, based upon pure reason, long ran its brilliant course; but at present it is no longer, I believe, influential even in Germany. As applied to law it is in the course of being replaced by a new inductive and empirical philosophy, which I shall venture to speak of later. The new philosophy has close relations to anthropology and psychology on the one hand and to practical politics on the other. The various and variant rationalistic or a *priori* German schools of philosophy demand respect. Whatever their defects or limitations, their genius is extraordinary and they were worthy of the

greatness of the German nation. Yet they are sometimes asserted by philosophers to have been founded on a defective psychology and a false metaphysic. But philosophers have one thing in common: they rarely agree. We cannot however forget that it was Hegel, the last of the great rationalists, who maintained that through law a human being attains the dignity of a person whose attribute is expressed by property. This one thought redeems much of Hegel's extravagance.

An *a priori* philosophy is only valuable to common lawyers when its data or presuppositions are verifiable, its postulates unquestioned; and this is rarely, too rarely, the case. This fact is the basis of the dissatisfaction in Germany with the older philosophies, although full of noble thought and elevated sentiment. That which ought to be exact is of all disciplines the most inexact. Many moderns are in consequence dissatisfied with the older German philosophies of law, but I have never seen the debt which their dissatisfaction owes to the English philosophical school admitted. They have always the reserve of a strong people when it comes to foreign influence.

The new German philosophies of law are critical studies of law, ethics, politics, economics, biology, and that science which deals with social man and is now awkwardly termed "sociology." These are all new sciences and their boundaries or contents are at present indeterminate. Biology did not become a science until the end of the eighteenth century. Sociology has not yet become a science, as historical events are not yet reduced to orderly sequence. This being so, a philosophy of law which attempts to embrace all these sciences is necessarily incomplete if not defective. The philosophic synthesis of incomplete sciences is likely to prove extremely faulty.

To what science does the law of the lawyers belong? Common lawyers deny that the making of new law is a part of the science of law, and they assert that it belongs to some other science: whether it be called legislation, politics, political science, or the science of government, is immaterial. Bentham stated that a philosophy of the conformity of law to the principles of justice belongs to the science of legislation. The German Holtzendorf, in "Die Principien der Politik," said that the science of politics is not occupied with the administration of justice, which belongs to



the science of law. But it was Savigny who finally admitted that the German language was not juridically formed. If Savigny was accurate in this statement, German is unfitted for a philosophy of law, and modern German treatises would be benefited by a recurrence to the Latin of the schools. All these things are to be considered before the primacy of any German philosophy of law can be conceded by common lawyers. The new socialistic philosophy of law repudiates the proposition that the making or formulation of law is foreign to the science of law, and as law is developed in Germany they may be right. But that they are wrong when their philosophy is applied to the science of law in English-speaking countries is a proposition already made evident.

At present in Germany there are innumerable philosophical writers on law who desire to reconstruct the science of law on the exclusive basis of modern economic life. Modern economic life they would also reconstruct on a new foundation. This creates a new philosophy of law which is revolutionary. But the conditions in Germany must be taken into account when we consider the effect of the new philosophy on the political life of that country. In most continental countries of Europe the development of law is conceived to be the function of trained jurists and not the function of untrained legislative bodies. In them the professorial vocation is confined to legal theory. The innumerable professorial writers on the philosophy of law are not, however, taken seriously in Germany, where Prussia practically controls the empire. Much of the theoretical philosophy of the provincial professors is ignored by the governing classes in Prussia, where conservative forces are in firm and stable control of the State, notwithstanding many of the new philosophies are inconsistent with the continued existence of the Empire. So long as the teachings of the new philosophies are not attempted to be put in practice, they are treated in Prussia as innocuous. Were it to become necessary, their practical applications, doubtless, would be strongly repressed by a stable and intelligent government. As it is, the revolutionary philosophies are treated by the State as a harmless product of an introspective band of scholars of no particular influence for evil and of no great account in the serious affairs of a government and a law, left to trained jurisconsults and bureaucrats.

It is in a country where institutions are less stable and higher

forms of education less general than in Germany and England that the revolutionary doctrines of the theoretical expositors of law are more apt to take root and to spread their pernicious influences among incompetent or shallow thinkers. Thus it is that the modern German philosophies of law are likely to become dangerous to the institutions of this country while perfectly harmless in Germany as now constituted. This is the serious side of the Germanomania of some American professors of law, educated in Germany or imbued with German thought and theory. Society can never be reorganized by a philosophy. The difference between the attitude of Englishmen and Americans educated in Germany to German philosophies is very marked. The Englishman never forgets that he belongs to an older and more stable empire of thought, while the American at once succumbs and swallows the whole German feast. Whether it is that Americans are apt to regard our legal institutions as plastic, I do not know, but I do know that the result is not satisfactory to those who regard our common-law institutions and our constitutional government as even more stable than those of England in the present flux.

The older German philosophies of law were based upon such metaphysical conceptions as "final cause," "freedom of the will," or on *a priori* doctrines of inherent rights. Debatable as many of the principles announced by the rationalists may have been, there was little in the older philosophies of law which was mischievous when reduced to practice, if this were possible. But the new philosophies are both subversive and destructive in tendency. If one take up a modern German treatise on the science of law, the statement will generally be found, "that the origin and maintenance of law would not be possible without freedom of will." Yet modern psychology, I believe, does not even recognize the existence of the will as it is concerned only with the process of the will or volition. But be this as it may, it naturally suggests the question whether such discussions are as yet really profitable to common lawyers.

There are admirable German philosophies of law, such as Kohler's "*Lehrbuch der Rechtsphilosophie*," lately translated into English, and published in the "Modern Legal Philosophy Series" under the auspices of a committee of the Association of American Law Schools. But the newer German philosophies of law, based on law "with an economic content," elevate "society" above the State



and subordinate law to economic and abstract or a *priori* theories. In this they run counter to the stability and pragmatism of all our institutions. They would confuse our legislation with our administration of the law. They would turn every American judge into a legislator or legal philosopher on the lines marked out by the economic and philosophical thinkers of the socialistic schools. In other words, the new legal philosophies of law are the philosophies of socialism. Other inherent defects of these new philosophies of law are that they unduly magnify abstractions and the theorems of economics, now admitted to be a branch of ethics. Ethics and economics are more nearly related, as Bentham said, to a science of legislation or government than they are to the science of law. A philosophy of law which fails to perceive clearly this distinction tends to debase the administration of justice as applied for centuries in English-speaking countries. The new political theory of "social justice," which would turn every common-law judge into a philosopher of law, and have him disregard the law of the land for some vague conception of social economic justice, springs directly from the confusion of thought apparent in the new philosophies of law. The first principle of American government is the stability of law formulated on constitutional lines. The principles of the new philosophy would first destroy our American constitutions, and then reorganize our American governments according to the economic theories of the socialistic party.

But the greatest defect of the new philosophy of law is its assumption that economics and sociology are exact sciences. This cannot yet be conceded. A very long road is still to be traveled before the theorems and the deductions of either economics or sociology can be exact enough for the hand of a philosopher of law. Most of the American disciples of the new philosophy bestow no attention on the limitations and defects of the very system they are advocating. In discussing the new philosophies, they evince no trace of originality or independence of thought. If they indulge in any discussion whatever, it is a mere logomachy, and not a discussion of principle. When our American friends style each other "Neo-Kantian" and "Neo-Hegelian" it sounds imposing, but it cannot conceal a marked poverty of thought. An American "Neo-Kantian" suggests the story of the child who said its companion was a botanist because he liked the odor of flowers.

In conclusion, it is to be hoped that our lawyers will bring their critical faculty to bear when they approach the new German philosophies of law proposed for our acceptance. Let them realize that their own law is the result of an independent experience of a thousand years, that it is the law of the freest and most enlightened governments which the world has ever seen, and remembering this they will not reject their own law for a law made pursuant to a foreign system of philosophy, at war with American institutions. The greatest contribution of American thought to the philosophy of the world is that known as Pragmatism. It is highly probable that the great American philosophy of law will grow out of a modified pragmatism. In making this last tentative statement, I am not unmindful that the old Aristotelian or Scholastic philosophy is to our great advantage both explicit and implicit in the original of our common law and particularly immanent in that branch of it administered in the Court over which I have the honor to preside.

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NEW YORK CITY.

NOTE. — The platform of those teachers of law who do not subscribe to the once orthodox Anglo-American faith in the all-sufficiency of analytical and historical jurisprudence is set forth by Professor Wigmore in these words:

"Last, and most of all, the Wish would be to see this subject studied with an unremitting outlook for its Philosophy. Every institute and principle of law has a philosophy, — as every object in the sunlight has its attendant inseparable shadow. In the quest for the rule we must insist on including its reasons, and on lifting them out into the open. That human death may or may not be the subject of an action, — that truth is or is not a defense for the libeller, — that a judge is privileged absolutely or only qualifiedly, — that a secondary boycott is or is not justifiable, — all these rules and principles rest on reasons of some sort. They may be reasons of ethics, or of politics, or of economics, or perhaps of public health, or of a dozen other sorts. They may be found in experience or in dogma. But they are given to us independently of the rule of law itself. The rule of law is to be tested by the philosophy of the subject. In these days, when a restatement of the entire body of our law is impending, we must be students of reasons as well as of rules. And the conservative needs this quite as much as the reformer. He who is not ready to give reasons for the faith that is in him can not expect to hold his own against the demagogue and the crude innovator."<sup>1</sup>

Again he says:

"A rule of law — and especially any rule of General Rights — is a rule of life. It is founded on the dogmas and experiences of life; and life's dogmas and experiences are recorded in a vastly wider library than the covers of law-books comprise. Take, for instance, the law of arrest on suspicion. There, in the law-books, is the rule; but is all the philosophy of it there? Are not the histories full of the political convulsions that have attended that procedure? Is not the rule itself little more than the title-page to many long chapters of intense controversy and keen philosophizing? And to-day, in estimating the respect due to the rule, can it be studied without consulting

<sup>1</sup> Cases on Torts, preface pages, viii-ix.



those chapters of lay literature? Take again the very pressing problem of the boycott and the strike. Can their rules of law ever be consistently formulated without a philosophy which takes into account, not merely the ethics of human struggle, but also the postulates of economic science as to industrial competition? And there are scores of like instances."<sup>2</sup>

Critics had not been wanting who accused the law schools of undue narrowness, and one as late as 1907 proposed that the candidate for admission to the bar should be required to study "natural and civil law and the principles, foundations and spirit of law" by reading Burlamaqui's *Natural Law*, Pufendorf and "judicious selections from Savigny, Pothier, Domat, Grotius and D'Aguesseau."<sup>3</sup> It seemed to the Association of American Law Schools something of a reproach that seventeenth- and eighteenth-century works were still standing in this country for expositions of "the principles, foundations and spirit of law" and that translation of modern treatises which dealt with these subjects might be a service. To Judge Fowler, however, the project of the Association appears to be an attempt to subject America to the "modern philosophy of the German socialists."

In another paper dealing largely with the same subject,<sup>4</sup> Judge Fowler tells us that American common law "needs no assistance from without." If so, our law has lost a power of absorption of ideas from without which has been one of its marked characteristics in the past. Hitherto it has been no bar to the reception of ideas into our law that they were modern or that they came clothed in a foreign tongue. Wilson, Marshall, Kent, and Story made the Continental philosophy of law of the eighteenth century the staple of our juristic thinking. Later Francis Lieber introduced the German philosophical jurisprudence of the first half of the nineteenth century. Still later James C. Carter used the German historical jurisprudence of the last half of the nineteenth century to put down the codifiers. All these elements so introduced from without demonstrably entered into and helped form the modes of thought which we call the common law of America. Hence when Professor Wigmore, for example, suggests that the new stage of Continental thought represented by the social-philosophical jurists may have something for us he has abundant warrant in precedent. No one in speech or in writing at least has proposed that we subscribe offhand to every detail of the system of any philosopher, German or otherwise. What is urged is that now as in the past we look to what the leaders in the philosophical thought of to-day are thinking and saying and ask ourselves what use we may make of it. The juristic Podsnapery which sees danger in any contact of common law with modern Continental philosophy is wholly out of line with the best traditions of American legal science.

Of the three objections, namely, that the dangerous philosophy to which this country is about to be subjected is modern, is German, and is socialistic, the latter is evidently the one about which Judge Fowler is chiefly concerned. Apparently, however, he uses "socialist" and "socialism" rather as epithets than as terms of precise import. For no American teacher of law has followed Menger, or the socialist jurists of whom he was the leader. As to the social-philosophical and sociological jurists, some of whose writings have been expounded to American readers, to class them with Menger suggests the ward

<sup>2</sup> Cases on Torts, preface pages, ix.

<sup>3</sup> Dos Passos, *The American Lawyer*, 168.

<sup>4</sup> *The Future of the Common Law*, 13 *COL. L. REV.* 595, 603.

politician who explained to the newly naturalized Frenchman "The Republic, the Republicans, it is the same thing." Perhaps to one who can seriously assert in print that Stammler is the chief exponent of a sociological jurisprudence whose main dogma is that "legal science ought to be founded upon generalizations from a descriptive sociology,"<sup>5</sup> the difference between social-philosophical, sociological, and socialist are as negligible as the difference between Herbert Spencer and Rudolf Stammler.

Judge Fowler makes six points against any reception of modern German philosophy of law in this country. The first is that law is one thing in Germany and another in a country subject to the common law, in that in the latter there is always a rule of positive law at hand for the judge who, therefore, merely applies and never creates, whereas in Germany the distinction between legislation and juristic application is not kept clear. According to the common-law view, he tells us, the science of law and the science of legislation are wholly distinct, whereas the philosophers would confuse legislation with the administration of law. The orthodox fiction that a rule of the common law is always at hand potentially to meet every case and that the judge does no more than discover it by logical process and apply it had broken down without any assistance from Germany. Austin long ago called it a childish fiction. Professor Gray, whom no one would accuse of any taint of sociological jurisprudence, had asserted boldly that tradition and legislation furnished simply raw materials which were made into law by the courts. Indeed this doctrine came into France and Germany from England, not into English-speaking countries from Continental Europe. It is true, English analytical jurists have uniformly insisted upon the fundamental distinction between the science of law and the science of legislation. This, however, was only a part of the general tendency to excessive specialization in the nineteenth century and abandonment of that narrow view of legal science is a part of the general movement to give up the watertight-compartment theory of learning which has been going on upon every hand. Indeed the movement for unification of the social sciences came from this country, and it might reassure Judge Fowler to remind him that abroad sociology has been known as the American science.

The second point made is that for the common-law lawyer a right is something resting upon positive law and hence we need not trouble ourselves with the interests which such legal rights secure or the ethical or philosophical problems which are involved in securing them. As to this, it should be remarked that common-law judges have always concerned themselves with these questions. As Judge Dillon has said, "Ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live."<sup>6</sup> In periods in which the law is stable, as in the last half of the nineteenth century, philosophy is not of great moment. But in periods in which the law is formative or is growing, it has always grown under the influence of philosophical ideals. It is of great consequence, therefore, in such periods that juristic and judicial thinking be in touch with the best lay thought of the time. Such was the case in the classical period of American law in the past, and there is no reason to suppose that a straitjacket can be imposed upon our juristic thought in the period of growth upon which we have entered.

<sup>5</sup> Fowler, *The Future of the Common Law*, 13 COL. L. REV. 595, 605.

<sup>6</sup> *Laws and Jurisprudence of England and America*, 18.



The third point is that neither Roman nor English legal development has been greatly influenced by philosophy. In the reaction from the metaphysical philosophy of law of the nineteenth century such statements were frequently made. And yet it is a commonplace of the books that the classical Roman law was largely shaped by Greek philosophy. The contact of lawyer and philosopher in a period of growth resulted in liberalization of the law exactly as happened afterward in Continental Europe in the seventeenth and eighteenth centuries. As the vouching of German writers for this proposition might be objected to, it may suffice to cite the leader of English students of the Roman law, Mr. Buckland of the University of Cambridge. He says, "If the primitive Roman law may fairly be called Græco-Roman as being filled with ideas either derived from or held in common with the Greek tribes . . . it may be with no less justice applied to the classical Roman law itself. Not merely were the jurists soaked in Greek philosophy, but that law was in the main the work of men of Greek or at least Oriental origin."<sup>7</sup> As to our own law, one needs only to look at the law lectures of James Wilson, framer of the Constitution, professor of law in the University of Pennsylvania, Justice of the Supreme Court of the United States, at the portion of Kent's Commentaries dealing with public law, or at Story on the Constitution, to perceive how thoroughly our notions of the relation of individual and state, of the law as a system of securing individual interests, of the duty of courts with respect to legislation which infringes natural rights, and our turning of the common-law rights of Englishmen into the natural rights of men are the result of contact with the French and Dutch publicists.

The fourth point made is that the new philosophy of law assumes that economics and sociology are exact sciences. I know of no modern writer on philosophical jurisprudence who makes such an assumption. Nineteenth-century economics might be amenable to such a charge. As to the philosophical jurisprudence of to-day, it would be more correct to say that it doubts whether even the nineteenth-century Anglo-American jurisprudence is the exact science which its votaries have taken it to be.

Fifth, the point is made that the social-philosophical jurisprudence is not taken seriously at home where "the theoretical philosophizing of the provincial professors (!) is ignored by the governing classes of Prussia." In other words, Judge Fowler conceives that the social-philosophical jurisprudence, a harmless toy at home where the War Lord and the Prussian bureaucrat see to it that no harm comes to the commonweal, is a most dangerous toy abroad where the American law-teacher, with no originality and no independence of thought, is not held in check by a benevolent despot or a beneficent administrative oligarchy. Possibly he would say that, on the one hand, Austria, where perhaps the foremost representative of sociological jurisprudence lives and teaches, is preserved by the Catholic monarchy and that, on the other hand, France, where not only sociological jurists, but socialist jurists may be found in plenty without check, is on the road to political and juristic perdition.

Finally, we are told that the American philosophy of law will be pragmatism. This is not at all a new proposition. I suggested it some years ago in a paper entitled "Mechanical Jurisprudence."<sup>8</sup> Moreover, I have twice

<sup>7</sup> Buckland, *Equity in Roman Law*, 135.

<sup>8</sup> 8 *COL. L. REV.* 605. See also my paper, *The Scope and Purpose of Sociological Jurisprudence*, 25 *HARV. L. REV.* 489, 516.

endeavored to sketch a juristic treatment of interests (natural rights) from the pragmatist standpoint.<sup>9</sup> But some of our most promising American students of the philosophy of law are to be found in the camp of the neo-realists, and there seems no reason to suppose that it would be possible or desirable to have all American jurists in the same philosophical camp.

Specifically, Judge Fowler fears two ill results. (1) First he fears that the administration of justice as carried on for centuries in English-speaking countries will be debased in that every common-law judge will be turned into a philosopher of law and so "disregard the law of the land for some vague conception of social economic justice." When contact with the philosophical views of the eighteenth century led English courts in dealing with mercantile questions and in bringing about the absorption of the law merchant into the common law to make what then seemed startling innovations, there were many who were persuaded that the law of the land was lost. Even Thomas Jefferson advocated receiving English law as of the first year of the reign of George III so as "to get rid of Mansfield's innovations."<sup>10</sup> But philosophy has played its part also in periods of stability, as may be shown, for example, by the decisions of the New York Court of Appeals on the subject of liberty of contract which proceeded upon the proposition that that government governs best which governs least and treated due process of law as declaratory of Spencer's Social Statics.<sup>11</sup> The stability of our Anglo-American judicial tradition is threatened not by philosophers, but by circumstances which, as so often in the past, require to some extent a juristic new start and have brought upon us, whether we will or not, a period of growth comparable to the rise of the court of equity in the sixteenth and seventeenth centuries.

(2) Second, he fears that the new philosophy of law, being a philosophy of socialism, will destroy our constitutions and subvert American legal institutions of which constitutions are the pillars. As to this, perhaps it is enough to say that eminent representatives of the social-philosophical school in Germany, whose writings are much cited by American law-teachers, are so far from being socialists that one of them makes a vigorous philosophical argument for the German monarchy.<sup>12</sup> When some ten years ago American law-teachers were so bold as to challenge the state of American procedure and to urge a study of English organization of courts and English procedure, we were told that they were making "drastic attacks upon the American judiciary," and that nothing but ill could result. To-day the profession at large is saying all that they said and more. It may be suspected that ten years hence most of what is dubbed socialism because it is a bit unfamiliar to those steeped in the Anglo-American law reports will appear quite commonplace.

*Roscoe Pound.*

HARVARD LAW SCHOOL.

<sup>9</sup> Legislation as a Social Function, *Proc. of the Amer. Sociological Soc.*, VII, 148, 155; *The Philosophy of Law in America*, *Archiv für Rechts- und Wirthschaftsphilosophie*, VII, 385, 397.

<sup>10</sup> Tyler, *Letters and Times of the Tylers*, I, 265.

<sup>11</sup> See the opinion of O'Brien, J., in *People v. Coler*, 166 N. Y. 1, 14; also the classical statement of Mr. Justice Holmes in the dissenting opinion in *Lochner v. N. Y.*, 198 U. S. 45, 75.

<sup>12</sup> Kohler, *Lehrbuch der Rechtsphilosophie*, § 24.



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THE HARVARD LEGAL AID BUREAU. — The work of the Legal Aid Bureau during its first academic year has ended even more successfully than was anticipated. To insure permanent organization, and at the suggestion of the State Board of Bar Examiners, and of the Bar Association, the Bureau was incorporated this winter as a charitable corporation under the Massachusetts statute. The members now appearing in court do so as agents of the corporation. The work has been constant while varied in its character. From October 1, 1913, to May 1, 1914, one hundred and ninety-one clients called at the Bureau for assistance. Of these one hundred and ninety-one, one hundred and eight were men, and eighty-three women. Although no record was kept of the nationality of the clients, the names would indicate that a majority were American. Practically all were American born. One hundred and forty-seven of the cases handled were for plaintiffs, and forty-four for defendants. The preponderance of plaintiffs' cases in this classification is explained by the grouping under that head of all *ex parte* matters, as advice, etc. In the arrangement of the cases by the subject-matter, irrespective of the side of the controversy represented, that designated as debt was the largest, with fifty-two. This included all contract claims, wages, assignments, etc. Domestic relation cases were second with twenty-nine. This group covered both marital difficulties and disputes as to children. Property cases were next with twenty-one. This embraced all landlord and tenant troubles, and the Bureau invariably represented the tenant. Eleven cases involved decedents' estates, in

five instances instruments were drawn, and in four the claims were against attorneys. Sixty-nine miscellaneous cases included personal injuries, claims under the Workman's Compensation Act, bastardy and criminal cases, and naturalization and civil service problems. Sixteen cases have been tried in court by members of the Bureau. Of these, six were before the Superior Court, four before the Probate Court, and six before the District or Municipal Courts. Fifteen trials were won by the Bureau, and one was settled to avoid defeat. \$4,268.13 has either been actually recovered or the payment of it decreed with bonds, in behalf of clients.

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COLLECTION OF BRIEFS IN THE LAW LIBRARY. — On page 775 of this issue of the REVIEW may be found a list of briefs submitted in the Ames Competition during the year 1912-1913. The list referred to in the April issue of this volume was erroneously described as consisting of briefs submitted during the year 1912-1913. It should have been 1911-1912. This list is being published for the first time.

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THE EFFECT OF FILING A LIMITATION OF LIABILITY CLAUSE WITH THE INTERSTATE COMMERCE COMMISSION.— The Supreme Court recently decided (Justice Pitney delivering a dissenting opinion) that, if a railroad has filed with the Interstate Commerce Commission a regulation that its liability on checked baggage will be limited to one hundred dollars unless a greater value is declared by the shipper and excess charges paid, a shipper, though ignorant of the existence of the regulation, who checks baggage without declaring any value can only recover the limited amount. *Boston & Maine Railroad v. Hooker*,<sup>1</sup> 34 Sup. Ct. 526.

By the settled rule of the federal courts,— now the only rule applicable to contracts for interstate shipments, because of the Carmack Amendment<sup>2</sup> as expounded in the *Croninger* case,<sup>3</sup>— the normal shipment is with liability for the entire actual value of the goods.<sup>4</sup> On theory, carriage with limited liability is an exceptional service which exists only when the shipper by shipping on a certain agreed or represented valuation has estopped himself to assert a greater worth.<sup>5</sup> This proposition has been recently re-affirmed by the Supreme Court.<sup>6</sup> The

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<sup>1</sup> For review of decision in State court see 25 HARV. L. REV. 186.

<sup>2</sup> 34 U. S. STAT. 595.

<sup>3</sup> *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148. For review of this case see 26 HARV. L. REV. 456.

<sup>4</sup> *Railroad Co. v. Fraloff*, 100 U. S. 24; *The Majestic*, 166 U. S. 375.

<sup>5</sup> *Hart v. Penn. R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151; *Graves v. Adams Express Co.*, 176 Mass. 280, 57 N. E. 462; *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62; *Magnin v. Dinsmore*, 56 N. Y. 168, 62 N. Y. 35; *Earnest v. Express Co.*, 1 Wood (U. S.) 573; *Matter of Released Rates*, 13 I. C. R. 550.

<sup>6</sup> "The ground upon which the validity of a limitation upon a recovery for loss or damage due to negligence depends is that of estoppel." *Neiman-Marcus Co. v. Wells Fargo & Co.*, 227 U. S. 469, 476, 33 Sup. Ct. 267, 269. "It has therefore become an established rule of the common law, as declared by this court in many cases, that such a carrier may, by a fair, open, just, and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the



court in the principal case admits the necessity of a valuation by the shipper, but the majority hold that the shipment without declaring the value is a valuation and that thus an estoppel is created. They argue that because the carrier has filed a regulation with the Interstate Commerce Commission as to how the agreed value shall be reached, the shipper is affected with constructive notice of the regulation, and that therefore where he fails to declare a greater value he can be said to have agreed or represented that the goods are worth only one hundred dollars. And further, if this regulation as to manner of valuation is unreasonable, the court holds that it cannot be declared invalid in a collateral proceeding, but must be directly attacked before the Interstate Commerce Commission.<sup>7</sup>

This seems a startling result. It is true that the *Hefly* and the *Mugg* cases decided that if a shipper requests and receives a certain service he is bound thereby to pay the rate scheduled for that service, regardless of his knowledge of the rate or of any inconsistent contract made by the carrier with him.<sup>8</sup> It is usually said that the shipper "has notice" of the appropriate rate by reason of its being on file with the Commission. As a matter of fact, the shipper in such a case has no notice of any kind, but in order to insure that every shipper receiving the same service shall pay the same rate, and so prevent discrimination, the law binds each to pay the legal rate, regardless of notice or lack of notice.<sup>9</sup> Taking literally this misleading phrase "presumed to have notice," it may seem logical to say if a shipper has notice of a rate by the filing of it, he also has notice of a grade of service, a limitation clause, or what might be called an offer for a valuation agreement, provided that is filed. Looking, however, at the substance of the situation, there is easily seen to be a great difference between the case where the shipper asks for a certain service and the instant case. Only in cases where a shipper is found to have received a certain service has it been held that the binding nature of the schedule need be invoked.<sup>10</sup> The issue in the principal case is what kind of a service did the shipper receive. Since legally the only type of service is one with unlimited liability unless an affirmative agreement or statement of valuation is made by the shipper, he cannot be said to have requested<sup>11</sup> or in fact to be entitled to the

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purpose of obtaining the lower of two or more rates or charges proportioned to the amount of the risk." *Adams Express Co. v. Croninger*, 226 U. S. 491, 509, 33 Sup. Ct. 148, 153. See also expression to the same effect in *Missouri, Kansas & Texas Ry. Co. v. Harriman*, 227 U. S. 657, 671, 33 Sup. Ct. 397, 400.

<sup>7</sup> *T. & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350; *United States v. M. C. Rd. Co.*, 122 Fed. 544, 546; *Clement v. L. & N. R. Co.*, 153 Fed. 979.

<sup>8</sup> *Gulf, Colorado, etc. Ry. v. Hefly*, 158 U. S. 98, 15 Sup. Ct. 802; *Texas & Pacific Ry. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628.

<sup>9</sup> *Chicago & Alton R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648.

<sup>10</sup> As in the *Hefly* and the *Mugg* cases, *supra*, Note 8.

<sup>11</sup> "There can be no limitation of liability without the assent of the shipper." *Cau v. Texas & Pacific Railway Co.*, 194 U. S. 427, 431, 24 Sup. Ct. 663, 664. "If any implication is to be indulged in from the delivery of the goods under the general notice it is as strong that the owner intended to insist on his rights and the duties of the carrier as it is that he assented to their qualification." *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 344, 382. *Railroad Co. v. Fraloff*, *supra*; *The Majestic*, *supra*.

limited service without the creation through constructive notice of a fictitious affirmative act on his part. Such a result is a wholly unnecessary, radical and unjust extension of the doctrine. If followed out logically, it would allow railroads to make use of a strategically advantageous position to overreach their patrons. For instance, they might discard their present lengthy bills of lading, issue simple receipts, and still bind the shipper without his knowledge by the mere filing of regulations with the Commission.

As to the rule that a filed schedule can only be attacked before the Commission it is submitted that there is no necessity of attacking the regulation at all. It is an attempt to effect a result which is in the nature of things impossible, that is, to enable one party to make a bilateral valuation agreement without the assent of the other party. The result is that the agreement as to valuation has not been made and therefore the common-law service is the basis of the shipment. To adjust the discrepancy between the service rendered and the rate paid, the railroad must collect the proper excess charges and thus avoid a discriminatory result.

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**DYING DECLARATIONS AS EVIDENCE IN CIVIL SUITS.** — The Kansas Supreme Court has recently held that the dying declaration of a deceased person may be used in a civil case to prove any fact to which the declarant would be permitted to testify if living. *Thurston v. Fritz*, 138 Pac. 625. In so doing, it frankly overrules its own former decisions<sup>1</sup> and abandons the universally established doctrine that such declarations are admissible only on the issue of the guilt of some person charged with the homicide of the declarant.<sup>2</sup> The argument is that if such evidence is admitted to hang a man, there should be no hesitation in its use to sustain the taking of property.

It may be admitted that, in its present form, the dying declarations exception to the hearsay rule is anomalous. But whether the departure from principle consists in admitting the evidence in homicide cases or in confining it to that class is a question upon which writers disagree.<sup>3</sup> Professor Wigmore's opinion, adopted by the Kansas court, is that dying declarations were generally recognized as admissible for all purposes until about 1800, at which time the courts blundered into the present rule. It is submitted that the facts do not support this view.

While the hearsay rule was still taking shape, we find the declarations of dying men referred to as especially trustworthy,<sup>4</sup> but the precise extent to which they could be admitted seems to have remained in doubt long after the hearsay rule itself had crystallized. At least there was originally no settled practice under the hearsay rule of admitting

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<sup>1</sup> *State v. Bohan*, 15 Kan. 407; *State v. O'Shea*, 60 Kan. 772, 57 Pac. 970.

<sup>2</sup> *Waldele v. New York Central & H. R. R. Co.*, 19 Hun (N. Y.), 69. See 1 GREENLEAF, EVIDENCE, § 156, 2 WIGMORE, EVIDENCE, §§ 1432 ff.

<sup>3</sup> See Professor Wigmore's able argument in favor of the rule adopted by the Kansas court. 2 WIGMORE, EVIDENCE, §§ 1430 ff. Also Mr. Chamberlayne's contention that the dying declaration exception is "discredited." 4 CHAMBERLAYNE, EVIDENCE, §§ 2819, 2859 ff.

<sup>4</sup> See 2 WIGMORE, EVIDENCE, § 1430, n. 1.



such declarations outside of homicide cases. Although we find counsel in 1744 referring to them as admissible generally,<sup>5</sup> another case in 1743 — in which plaintiff's counsel denied the existence of the whole hearsay rule — shows his opponent insisting that dying declarations are admitted only in criminal trials.<sup>6</sup> In 1761, the death-bed confession of a witness to a will that the document was forged, was offered as a dying declaration and as evidence to impeach the witness' attestation, and admitted.<sup>7</sup> Lord Mansfield, however, seems to have admitted it as a statement against interest. Though the case was twice cited for the competency of such a declaration to impeach the witness,<sup>8</sup> it was never afterwards referred to — judicially — as illustrating the dying declaration rule,<sup>9</sup> until Baron Parke, in 1836, put it on the latter ground in order to fortify himself in overruling it as an authority for the admissibility of declarations of deceased attesting witnesses, to contradict the assertions implied by the attestation.<sup>10</sup> One brief *dictum*, and two vague bits of judicial language, constitute the rest of the evidence that dying declarations were recognized as always admissible throughout the eighteenth century.<sup>11</sup> In 1820, and 1824, however, the rule was settled in substantially its present form by two short opinions which did not purport to overrule a single previous case or correct any current error.<sup>12</sup> Two contemporary texts,<sup>13</sup> and two American cases decided before 1820<sup>14</sup> treat the admission of dying declarations in civil actions as a logical, but not yet established extension of the settled rule admitting them in trials for homicide. Thereafter, the extension is consistently repudiated everywhere.

The conclusion that dying declarations were ever generally recognized as excepted from the hearsay rule scarcely seems the most natural

<sup>5</sup> *Omichund v. Barker*, 1 Atk. 21, 38.

<sup>6</sup> *Annesley v. Anglesea*, 17 How. St. Tr. 1140, 1161.

<sup>7</sup> *Wright v. Littler*, 3 Burr. 1244.

<sup>8</sup> *Aveson v. Kinnaid*, 6 East 188, 195. It is also explained on this ground in *Doe d. Sutton v. Ridgway*, 4 B. & Ald. 53, 55, and as a declaration against interest in *King v. Mead*, 2 B. & C. 605, 608. The principle that an attesting witness to a document, if dead, may be impeached by his own declarations contradicting the assertions implied by his attestation, was certainly recognized in England in the eighteenth century and is still law in the United States. *Harden v. Hays*, 9 Pa. St. 151; see *Boylan v. Meeker*, 28 N. J. L. 274, 294. But cf. *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650. See 2 WIGMORE, EVIDENCE, §§ 1033, 1514. This principle furnishes an ample basis for the decision in *Wright v. Littler*.

<sup>9</sup> But it was cited for this rule by counsel in *Doe d. Sutton v. Ridgway*, *supra*, and *King v. Mead*, *supra*, and in McNALLY, EVIDENCE, 386 (1802), and SWIFT, EVIDENCE, 125 (1810).

<sup>10</sup> *Stobart v. Dryden*, 1 M. & W. 615, 626.

<sup>11</sup> *Rex v. Drummond*, 1 Leach 337 (1784), contains a brief *dictum*, to that effect. *Rex v. Woodcock*, 1 Leach 500, 502 (1788), a homicide case, states the rule without noticing any limitation to such cases. The remarks in the Douglas Peerage case, 2 Hargr. Collect. Jurid. 387, 389, 397 (1760), were not only of the most cursory sort, but were addressed merely to the weight of evidence plainly admissible, and already before the court.

<sup>12</sup> *Doe d. Sutton v. Ridgway*, *supra*; *King v. Mead*, *supra*;

<sup>13</sup> McNALLY, EVIDENCE, 381, 386 (1802); SWIFT, EVIDENCE, 124 (1810). The statement of the latter book on this point appears to be copied from the former and adds little to its authority.

<sup>14</sup> *McFarland v. Shaw*, 4 N. C. 200; 2 Carolina Law Repository, 102 (1814). See *Jackson v. Vredenburg*, 1 Johns. (N. Y.) 159, 163 (1806).

one from this scanty evidence. It appears, rather, that these declarations were so familiar in homicide cases that they escaped the application of the hearsay rule, along with other common sorts of evidence; that when the resulting exceptions to that rule began to be reasoned about, it was widely argued that this one rested on a principle equally applicable to civil cases; but that the alleged general principle inspired so little confidence that when the courts were squarely asked to adopt the extension it was unanimously rejected, almost without a struggle.

That this should have been the outcome in 1800 is in itself strong evidence against the peculiar credibility claimed for dying declarations. To-day the increasing disbelief in divine vengeance, the obvious security from human retribution afforded by approaching death, and the great variety of motives to falsehood which may operate even upon a dying man,<sup>15</sup> make it still more difficult to justify the admission of dying declarations on any reasoning which does not call for the admission of all apparently honest declarations of persons whose testimony has become unavailable through death.<sup>16</sup> Furthermore, an apparent readiness to reconsider settled points of evidence necessarily encourages vexatious appeals; and the result in the principal case is to admit, without cross-examination, the testimony of the deceased party to a transaction while the mouth of his living adversary is closed by statute which the court cannot amend.<sup>17</sup> It would seem, therefore, that the adoption of this new rule of evidence, so sweeping, and of such debatable expediency, should be left to the consideration of the legislature.

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STATE REGULATION OF THE SALE OF STOCKS, BONDS, AND OTHER INVESTMENT SECURITIES. — A recent decision holding invalid the Michigan statute popularly known as the "Blue Sky" law raises the interesting question of how far a state may regulate the sale of stocks, bonds, and investment securities. *Alabama & New Orleans Transportation Co. v. Doyle*, 210 Fed. 173. In the last few years there has been a large increase in the number of investment securities of speculative nature and uncertain value. And by means of branch investment houses and traveling salesmen, the market for them has come to include an ever increasing proportion of the public. The liberty to carry on any business is within the protection of the Fourteenth Amendment,<sup>1</sup> and any limitation on this liberty must be justified under the police power. Restrictions on liberty are proper if reasonably adapted to the securing of

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<sup>15</sup> These motives may operate with more than ordinary force at a time when the opportunity to gratify revenge or affection is known to be slipping rapidly away. That they often do lead to falsehoods has been recognized. See 1 STEPHEN, HIST. CRIM. LAW, 448; *Carver v. United States*, 164 U. S. 694, 697, 17 Sup. Ct. 228, 230.

<sup>16</sup> This broad exception to the hearsay rule has been adopted by statute in Massachusetts. 1902 MASS. R. L. c. 175, § 66.

<sup>17</sup> 1909 KAN. GEN. STAT. c. 95, § 5914. This objection to the adoption of the rule in the principal case by decision is not confined to Kansas. Similar statutes prevail throughout the United States. They are collected in 1 WIGMORE, EVIDENCE, § 488.

<sup>1</sup> *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 431; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539; *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277.



a recognized social interest.<sup>2</sup> The preserving of the economic stability of society by protecting individuals from the loss of property by fraud has been recognized as securing a social interest.<sup>3</sup> Accordingly, the courts have held valid, statutes which require licenses and indemnity bonds from those dealing on a commission in farm produce,<sup>4</sup> or requiring licenses from pawn brokers<sup>5</sup> and peddlers<sup>6</sup>; also such statutes as require that oleomargarine should be labelled as such.<sup>7</sup> In certain cases it has been considered that it is to the social interest to protect the individual from loss to his property even when fraud is not involved. Many provisions with regard to insurance companies and banks are aimed at safeguarding the public from the results of unforeseen misfortunes or bad management.<sup>8</sup> Protecting the weak and ignorant from improvident contracts and other losses resulting from the losers' folly has been recognized as a social interest in usury and other similar legislation.<sup>9</sup>

Protecting the ignorant and improvident from loss in the stocks or securities of "wild-cat" schemes of a fraudulent or highly uncertain nature, might well be a subject for legislative action. But there is a strong public interest in the general freedom of business and the liberty of the individual to buy and sell as he chooses.<sup>10</sup> To be upheld as reasonable the benefits from any legislation must outweigh the restraint on liberty thus involved.<sup>11</sup> A peculiar danger of deception, or unwise speculation in stocks, bonds, and other securities comes from the difficulty which the untrained man finds in distinguishing between those that are valuable and those that are worthless. Accordingly, it would probably not involve an unreasonable restraint on liberty to require the licensing of the sellers and the recording of securities, in order to make it more difficult for the fraudulent to operate; nor would it be too

<sup>2</sup> See *Mugler v. Kansas*, 123 U. S. 623, 661, 8 Sup. Ct. 273, 297; *Ex parte Whitwell*, 98 Cal. 73; 27 HARV. L. REV. 573.

<sup>3</sup> COOLEY, CONST. LIMITATIONS, 7 ed., p. 887. *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154; *State v. Moore*, 104 N. C. 714, 10 S. E. 143; *Steiner v. Ray*, 84 Ala. 93, 4 So. 172; *Commonwealth v. Crowell*, 156 Mass. 215, 30 N. E. 1015.

<sup>4</sup> *State v. Wagener*, 77 Minn. 483, 80 N. W. 633; *contra*, *People v. Berrien Circuit Judge*, 124 Mich. 664, 667, 83 N. W. 594, 595. Compare also *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. 413.

<sup>5</sup> *City of Grand Rapids v. Braudy*, 105 Mich. 670, 64 N. W. 29.

<sup>6</sup> *People v. Russell*, 49 Mich. 617.

<sup>7</sup> *Plumley v. Massachusetts*, *supra*.

<sup>8</sup> FREUND, THE POLICE POWER, § 400. For a discussion of the extent to which the regulation of insurance companies has gone, see 25 HARV. L. REV. 372. The case which goes the farthest in allowing the regulation of banks is that which holds constitutional the statute providing that all banks must contribute to a guaranty fund to protect depositors against the failing of any bank. *Noble Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186.

<sup>9</sup> The principle that the police power justifies the preventing of improvident contracts has been applied to protect laborers in getting their wages in cash and at frequent intervals. *Re House Bill*, No. 1230, 163 Mass. 589, 40 N. E. 713. *Hancock v. Allen*, 121 Ind. 366; *Peel Splint Coal Co. v. State*, 36 W. Va. 802. Also in the case of preventing sales on a margin. *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. 368. Compare cases where restrictions on the sale of trading stamps have been held unconstitutional. *State v. Dodge*, 76 Vt. 107, 56 Atl. 983; *People v. Gillson*, 109 N. Y. 389; *State v. Ramseyer*, 73 N. H. 31, 58 Atl. 958.

<sup>10</sup> For a further discussion of the legislative power to limit the freedom of contract, see 27 HARV. L. REV. 372.

<sup>11</sup> *Lochner v. New York*, *supra*.

great a restraint to require the giving of complete data as to the condition of the company and the nature of the security in order to make more clear the merits of an investment proposition.

The Michigan statute goes far beyond this. It also gives to a Commission the right to prohibit the sale entirely if it finds that "the sale would in all probability result in a loss to the purchaser."<sup>12</sup> This would seem to go far beyond what is necessary for protection against fraud, and the restriction of the liberty of the purchaser having knowledge of the facts, in choosing for himself what are for him good or bad investments is so sweeping as to be an unreasonable way of preventing loss from folly. The same extreme paternalism is shown in the provision that the sale of all securities is forbidden for thirty days after filing data with the Commission. When one considers the multitude of sound securities affected and the necessity in many cases of quick sales in order properly to finance legitimate business ventures, the restraint on liberty is clearly improper.<sup>13</sup>

Assuming that some regulation of the sale of securities is within the due process clause the question remains whether such regulation is an interference with interstate commerce in so far as it affects the sale of stocks and bonds brought in from outside the state. A state may not ordinarily tax or require a license fee for the negotiating of contracts which contemplate the interstate shipment of an article of commerce.<sup>14</sup> An insurance contract made with a foreign company which contemplates the interstate transfer of a policy is not interstate commerce.<sup>15</sup> On the other hand, lottery tickets are the subject of interstate commerce.<sup>16</sup> An early decision holds that the dealer in foreign bills of exchange is not engaged in interstate commerce and may be taxed by a state<sup>17</sup> but the modern tendency to consider bonds and negotiable securities as analogous to chattels would indicate that they would now be held to be the subject of interstate commerce.<sup>18</sup> However, regulations of the sale if properly within the police power would probably be justified even though interstate commerce were affected.<sup>19</sup>

<sup>12</sup> This also may be an improper delegation of legislative power. The rule laid down is so indefinite that the determining of each case would be very close to an exercise of discretion legislative in nature rather than acting as an executive in carrying out a rule laid down. See 15 HARV. L. REV. 852; 21 HARV. L. REV. 205.

<sup>13</sup> The Bulk Sales Acts providing a delay of sales in bulk by a dealer until a reasonable time to notify creditors are clearly distinguishable. *Lemieux v. Young*, 211 U. S. 489, 29 Sup. Ct. 174; *Kidd v. Musselman*, 217 U. S. 461, 30 Sup. Ct. 606.

<sup>14</sup> *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. 492; *Rearick v. Pennsylvania*, 203 U. S. 507; *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229; *International Text Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481.

<sup>15</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168; *N. Y. Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495, 34 Sup. Ct. 167.

<sup>16</sup> *The Lottery Case*, 188 U. S. 321, 23 Sup. Ct. 321.

<sup>17</sup> *Nathan v. Louisiana*, 8 How. (U. S.) 73.

<sup>18</sup> See *Wheeler v. Sohmer* (Sup. Ct. U. S., April 20, 1914, not yet reported). Title to lottery tickets passes by delivery. Possibly a distinction might be taken between those written instruments which are negotiable and stocks which might be classed with insurance policies, but this hardly seems reasonable.

<sup>19</sup> *Plumley v. Massachusetts*, *supra*. It might perhaps be contended that the regulation of stocks and bonds should be limited by the "original package" doctrine. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, but it is submitted that no court would apply that doctrine in such a case.



THE PROBLEM OF GOING VALUE. — The normal price of an article produced under competitive conditions gives the producer a fair return (and no more) plus the cost of production. The regulation of rates of public service companies is an attempt to fix by artificial means, in the absence of competition, a price which will limit compensation to a fair return plus the cost of production. If no plant were necessary, the cost of production would be simply the cost of materials and labor. Since, however, there must always be an expensive permanent business equipment, an additional element of production cost is the yearly cost of the use of the present outlay of capital devoted to the public.<sup>1</sup> This present outlay of capital amounts to the original cost of the full business equipment, minus physical depreciation, and plus or minus any increase or decrease in value of the equipment due to a change in the present "cost-value" of that equipment.<sup>2</sup> Rates must be charged, then, which will meet operating expenses and yield a fair return on the present cost-value of property in use, ascertained in the way just mentioned.

Much difference of opinion exists as to whether what is called "going value" should be included in the computation of the present cost-value of the property in use.<sup>3</sup> A recent case in the New York Court of Appeals, in including it, follows the better view. *People v. Willcox*, 104 N. E. 911. The confusion, it is submitted, is due to a lack of understanding of what "going value," used in this connection, really amounts to. It clearly cannot include the capacity to continue to make large profits under rates which have not been found to be reasonable. But it is true, in the first place, that there is a great difference between the naked plant of a manufacturing concern, its "bare bones,"<sup>4</sup> and a running business into which life has been infused by means of a system or organization.<sup>5</sup> Such

<sup>1</sup> The discussion up to this point is condensed from an article on "Fair Value for Rate Purposes," by Robert H. Whitten, in 27 HARV. L. REV. 410.

<sup>2</sup> This seems to be, roughly, a fair statement of the best method of computing the present cost-value of the property devoted to the public. Other methods, of course, are possible. See Mr. Whitten's article, *supra*. This present cost-value must be carefully distinguished from the enhanced value of a concern due to the large profits it may return, which, of course, would be useless for rate purposes. The expression "present cost-value" is used because it is thought to express the conception of the capital charge on which the company is allowed to earn a fair return better than the expression "present value" does. The courts, however, almost uniformly use the term "present value."

<sup>3</sup> Cases holding that it should be included are: *Public Service Gas Co. v. Board of Commissioners*, 84 N. J. L. 463, 87 Atl. 651 (this case and the principal case are now the two leading cases on the subject); *Venner Co. v. Urbana Waterworks*, 174 Fed. 348; *Des Moines Water Co. v. City of Des Moines*, 102 Fed. 103; *Pioneer Tel. & Tel. Co. v. Westenhaver*, 20 Okla. 429, 118 Pac. 354; *Application of the Northern Michigan Power Co.*, Orders and Opinion of Michigan Railroad Com., Vol. II, No. 1, p. 25.

Cases holding that the item should not be allowed are: *Cedar Rapids Water Co. v. City of Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081; *Consolidated Gas Co. v. City of New York*, 157 Fed. 849; *Mayhew v. Kings County Lighting Co.*, 2 P. S. C. 1st Dist. (N. Y.) 659 (the principal case before the commission); *Municipal League of Phoenix v. Pacific Gas & Electric Co.* (decision of the Arizona Commission) reported 21 A. Tel. & Tel. Co. leaflets 699 — see particularly pp. 715-717; *Fuhrmann v. Cataract Power & Conduit Co.*, 3 P. S. C., 2d Dist. (N. Y.) 656. The New York commissions, however, will be forced to alter their views because of the decision in the principal case.

<sup>4</sup> Quoted from the opinion of Mr. Justice Lurton in *Omaha v. Omaha Water Co.*, 218 U. S. 180, 202, 30 Sup. Ct. 615, 620.

<sup>5</sup> See an especially good statement in *M. K. & T. Ry. Co. v. Love*, 177 Fed. 493, 496.

a system costs money. Brain work creates it; and that brain work, and necessary incidental expenses, must be paid for. In the second place, since the organization, when completed, is a recognized permanent instrument of production, the necessary cost of perfecting it is part of the capital expenditure. Proof of this is found in the fact that it does not, like an operating expense, produce an immediate return, but goes into something permanent which without additional outlay brings in its return year after year—the distinguishing characteristic of capital expenditures.

Such going value, then, seems clearly an element of capital charge. But in estimating it a difficulty arises from the fact that the expense of acquiring it includes portions of the salaries of employees, which are charged to operating expenses. How shall the amount of salaries which has gone to acquiring this going value be determined? It is best done by adopting a system which takes into consideration the period of time, during the building up of the system, in which the original capital lay unproductive—a loss which is clearly an element of the cost. The investors who place their money in an enterprise which they know will not give them a fair return until a system is perfected, put into the investment during these first years the amount of money which they would have received as interest or profit on their capital in another business. To that amount, under normal circumstances, the plant's present cost-value is increased, that is, in addition to the physical materials, the plant has cost the use of the capital during the unproductive period.<sup>6</sup> This includes the cost of personal services in constructing the organization, because that amount which has been charged to operating expenses has to that extent cut down the theoretically justifiable profits.

One more matter must be noted as to the estimation of a plant's going value. In all matters of valuation, the figures taken represent the present cost-value, not the actual cost-value. Thus, if poor management made the physical plant cost more than it should, the company can fix its present cost-value only at what it should be, not at what it actually cost the company to acquire it. So it is with going value. Its present cost-value must not be fixed with reference to the actual facts. A hypothetical plant, built simultaneously with the existing one, must be taken as the criterion, and the present cost-value of its operating system, i. e. its going value, found. In the principal case, it would seem that the present cost-value of the going value was computed solely with reference to the existing plant; and in this respect the case seems objectionable.

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PRIVILEGE IN PETITIONS FOR PARDON.—Privilege in the law of libel and slander is of two kinds: that which is defeasible by proof of malice, and that in which malice or wrong motive is not considered. To allow

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<sup>6</sup> The analogy of interest during the physical construction of the plant is helpful. The sum that the capital would have earned at a fair interest (query, whether this should not be at a fair profit) during the construction period is added to the capital, for the plant has cost the use of the capital during this period. *Long Branch Commission v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474; *Pioneer Tel. & Tel. Co. v. Westenhaver*, *supra*.



the defense of absolute privilege is in effect temporarily to deprive the libeled party of all protection from defamation. The justification must rest on the principle that where the demands of the public welfare and the right of the private individual conflict, the latter must yield.<sup>1</sup> But the hardship on the victim of the defamation and the opportunity for abuse require the privilege to be narrowly restricted. Communications made in the course of, and with reference to, judicial proceedings illustrate the reasons for the immunity. The object is to eliminate from the speaker's mind the fear of vexatious litigation, or even of damages at the hands of a jury who may mistake apparent for actual malice, which might deter him from saying what the court wants to hear.<sup>2</sup> Judicial officers are protected to assure the independence of the judiciary.<sup>3</sup> Party, counsel, or advocate, in what is spoken or pleaded, are privileged on the ground that the law seeks to give every litigant a chance to have his case fearlessly presented.<sup>4</sup> The immunity to witnesses is further necessitated because of the inherent difficulties which at best attend extracting the truth from their testimony.<sup>5</sup> It will thus be seen that in each case the policy in favor of immunity is very strong. The American cases tend to apply the principle more narrowly than the English, as is shown by the requirement that the pleadings be relevant.<sup>6</sup> But a recent case treats as absolutely privileged a petition to a state governor for pardon. *Connellee v. Blanton*, 163 S. W. 404 (Tex. Civ. App.). The result is reached on the ground of the analogy to pleadings in civil actions, and to petitions and memorials to legislatures, and on the further ground that the state constitution especially guaranteed the right to apply for redress of grievances.

The power to pardon offenses against the state is usually given to the governor by the state constitution. The power was originally thought of as an attribute of the English sovereign. And its perpetuation in the United States seems justified as a sort of supplemental machinery, required by the rigidity of criminal procedure, to relieve those who, though technically guilty, may be morally innocent or meritorious.<sup>7</sup> Pardons issue of grace, not of right. And a petition merely sets forth considerations calculated to convince the executive that clemency should be exercised. The peculiar reasons making pleadings privileged seem lacking. Since the litigant in court is conceived to have a *right* to have his claim decided in accordance with certain legal principles, he is given unrestricted opportunity to make full disclosures. The petitioner for pardon, on the other hand, is only entitled to appeal

<sup>1</sup> See BOWER, CODE OF ACTIONABLE DEFAMATION, 362

<sup>2</sup> See *Dawkins v. Lord Rokeby*, L.R. 7 H. L. 744, 755.

<sup>3</sup> *Scott v. Stansfield*, L. R. 3 Ex. 220. In the days when the independence of the English judiciary was not thought important, the privilege seems nevertheless to have been sustained on the peculiar ground that the king could not with propriety object to what he himself said through the medium of one of his judges. See BOWER, CODE OF ACTIONABLE DEFAMATION 373.

<sup>4</sup> *Munster v. Lamb*, 11 Q. B. D. 588.

<sup>5</sup> *Seaman v. Netherclift*, 2 C. P. D. 53. The further explanation has been suggested that since the witness is compelled by *subpoena* to testify, he should not be punished for an innocent attempt to comply. See *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, 267.

<sup>6</sup> See 23 HARV. L. REV. 645.

<sup>7</sup> See 26 HARV. L. REV. 644.

to the governor's discretion; there is no right to a correct decision. Again, unrestrained disclosures seem relatively unimportant in a petition for pardon, since, unlike the case of an action where there are pleadings, the petitioners may, without amending their petition, bring forward further grounds for clemency; and the executive in deciding whether to grant immunity is not confined to a consideration of the facts and reasons adduced by the petitioners. Furthermore, this informality may make such petitions a mere cloak for libel, whereas judicial proceedings would not be instituted for the sole purpose of inserting a libel in the pleadings. As to the analogy relied on to memorials to legislatures, such petitions, by the better view in America, are only absolutely privileged when they become a part of the legislative proceedings.<sup>8</sup> The clause in the Texas Constitution would not seem to change the situation, for it only assures the right to file the petition, not to have an adjudication.<sup>9</sup> And the ever increasing facilities for disseminating what is published seems a further argument to reinforce the policy against extending the privilege.

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RIGHT OF CORPORATION TO PURCHASE ITS OWN STOCK. — No subject presents greater conflict on the authorities than the right of a corporation to purchase its own shares. While the majority of American decisions permit corporations to do this, provided the rights of creditors are not involved,<sup>1</sup> the English authorities and a substantial minority of the American courts hold such transactions *ultra vires*.<sup>2</sup> They argue that such a power is not one which it is necessary that the corporation should possess to carry on its business satisfactorily. A number of the jurisdictions following this view, however, have held that the receipt of shares in satisfaction or as security for an indebtedness is quite within

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<sup>8</sup> See *Cook v. Hill*, 3 Sandf. (N.Y.) 341. In England the early case of *Lake v. King*, 1 Saund. 131 a, is said to have established the principle that petitions to Parliament are absolutely privileged. See ODGERS, LIBEL AND SLANDER, 3 ed., 209. And the same was held still earlier of a petition to the Queen. *Hare and Mellers Case*, 3 Leon. 138, 163. Both of these early cases seem to proceed on the theory that Parliament and the Crown are part of the judicial system of England. They furnish, therefore, no analogy for petitions to American legislatures.

<sup>9</sup> Art. 1, § 27. "The citizens shall have the right in a peaceable manner, to assemble together for their common good, and to apply to those invested with the power of government for redress of grievances or other purposes, by petition, address, or remonstrance." It should be observed that peculiar provisions in a state constitution, creating a Board of Pardons and providing for formal applications and hearings, may substantially amount to forming a separate judicial tribunal. *Keenan v. McMurray*, 34 Pitts. Leg. J. N. S. 223.

<sup>1</sup> *Hartridge v. Rockwell*, R. M. Charlton (Ga.), 260; *Dupee v. Boston Water Power Co.*, 114 Mass. 37; *Chicago, etc. R. Co. v. Marseilles*, 84 Ill. 643; *Porter v. Plymouth Gold Mining Co.*, 29 Mont. 347, 74 Pac. 938; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376. But note that while *ultra vires*, the transaction is not so objectionable as to justify *quo warranto* against the corporation. *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 41 N. W. 1020.

<sup>2</sup> *Trevor v. Whitworth*, L. R. 12 A. C. 409; *Maryland Trust Co. v. Nat. Mechanics Bank*, 102 Md. 608, 63 Atl. 70; *Wilson v. Torchon Lace & Mercantile Co.*, 149 S. W. 1156 (Mo.); *Coppin v. Greenlees & Ransom Co.*, 38 Oh. St. 275; *German Savings Bank v. Wulfekuhler*, 19 Kan. 60.



the corporate powers.<sup>3</sup> If in these cases the corporation has power to receive its own shares, there seems no reason in the nature of things why it has not power to purchase under other circumstances. Moreover, the objection cannot be raised that the corporation by such dealings increases or diminishes its capital stock, a thing frequently forbidden by statute, because the authorities are practically unanimous in holding that the purchase does not extinguish the shares bought but merely transfers them into the hands of the company.<sup>4</sup> Hence the objection to the practice instead of resting on a lack of power must find its logical basis in the disadvantages to other shareholders and to corporate creditors which may result from such transactions.

There seem two objectionable features to such purchases so far as other shareholders are concerned. First, the purchase of shares reduces the amount of capital embarked in the corporate enterprise and thus the burden of meeting the company's liabilities falls more heavily on the remaining shares. In the event of insolvency, in case shareholders have some form of individual liability, or if they are only liable to the full par value of their stock, the amount for which each shareholder may be held is made correspondingly larger. Second, the buying in of stock with corporate funds in part contributed by a minority opposing the sale may well enable a rival majority to obtain a strangle hold upon the corporate affairs, since the amount of votable stock is thereby temporarily at least decreased<sup>5</sup> and the influence of the majority made correspondingly greater.<sup>6</sup> These considerations, however, do not furnish a conclusive ground for absolutely prohibiting such transactions, but merely should give to any non-consenting shareholder a right to have them set aside.<sup>7</sup>

The objections as to the reduction of the fund available for the payment of the company's debts apply even more strongly to creditors, but the courts seem more or less at a loss as to how to treat this situa-

<sup>3</sup> *Taylor v. Miami Exporting Co.*, 6 Oh. 176; see *St. Louis Rawhide Co. v. Hill*, 72 Mo. App. 142, 148 (in payment of a debt due the corporation); see *German Savings Bank v. Wulfekuhler*, 19 Kan. 60, 65 (in security of a debt due the corporation); *State v. Oberlin Building & Loan Association*, 35 Oh. St. 258 (took stock and released from liabilities on it and collateral). Likewise receipt by way of gift or devise would probably be sustained in these jurisdictions although the question has only been adjudicated elsewhere. *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Rivanna Navigation Co. v. Dawsons*, 3 Gratt. (Va.) 19.

<sup>4</sup> On the theory of choses in action, this is hardly sustainable, but the stock is apparently treated more like a chattel or negotiable note, and, in the absence of contrary evidence is considered to be merely temporarily retired and to be subject to re-issue. *State v. Smith*, 48 Vt. 266; *City Bank of Columbus v. Bruce*, 17 N. Y. 507; *Commonwealth v. Boston & Albany R.*, 142 Mass. 146, 7 N. E. 716; see *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418, 452; *Currier v. Lebanon Slate Co.*, 56 N. H. 262, 268; *Taylor v. Miami Exporting Co.*, 6 Oh. 176, 219; *contra*, 1 MORAWETZ, *PRIVATE CORPORATIONS*, 2 ed., § 112.

<sup>5</sup> For although shares of stock bought in by the corporation are not extinguished they cannot of course be voted while held by the company. *American Ry. Frog Co. v. Haven*, 101 Mass. 308; *M'Neely v. Woodruff*, 13 N. J. L. 352.

<sup>6</sup> For a more detailed explanation of this objection, see 1 MACHEN, *MODERN LAW OF CORPORATIONS*, § 626.

<sup>7</sup> *Currier v. Lebanon Slate Co.*, 56 N. H. 262; cf. *Glenn v. Hatchett*, 91 Ala. 316, 8 So. 656; (agreement to release a shareholder from unpaid subscriptions on stock, retiring a part and treating remainder as fully paid).

tion. Many courts have held that the assets of the corporation are a trust fund for the benefit of creditors.<sup>8</sup> But this theory even if valid does not solve the problem, for the assets do not become a trust fund until the corporation is insolvent,<sup>9</sup> and it is clear that even before insolvency a reduction in the actual capital may work a detriment to creditors in that it takes away their right to look to the entire capital as a security for the indebtedness of the corporation. The proper treatment of the situation would seem to be on the recognized principle of fraudulent conveyances. That is, any such reduction is a fraud on prior creditors because it is a distribution of assets for which nothing of value to the creditors is received in return; and on subsequent creditors because they contract on faith of assets represented by the capital stock.<sup>10</sup> Accordingly a purchase by an insolvent corporation of its own shares either by cash or note should be voidable.<sup>11</sup> If the corporation was solvent but made the payment from its capital fund, it would seem that the creditors should in every case be able to avoid the transaction,<sup>12</sup> this being particularly clear where the need of those assets to pay their debts could be foreseen.<sup>13</sup> Where the purchase is made from such surplus as could legitimately be paid in dividends the above objection would not apply, however, because the assets on which the creditors have a right to rely have not been depleted.<sup>14</sup> Yet, if the result would be to free from individual liability a shareholder who would otherwise be personally liable to creditors, it would seem that the transaction should be voidable, but only to the extent of permitting a recovery by the creditor of the amount of this personal liability.<sup>15</sup> In a recent case,

<sup>8</sup> This theory was first adopted by Story, J., in *Wood v. Drummer*, 3 Mason (U. S.) 308.

<sup>9</sup> See *Graham v. Railroad Co.*, 102 U. S. 148, 161; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 383.

<sup>10</sup> *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 50 N. W. 1117. For a fuller discussion of this problem, see 20 HARV. L. REV. 401.

<sup>11</sup> *In re Smith Lumber Co.*, 132 Fed. 618; *Buck v. Ross*, 68 Conn. 29 (using the language of the trust theory).

<sup>12</sup> The corporation should be treated as under an absolute duty to keep its entire capital fund as a margin of safety for creditors. On this theory any decrease in that fund would be a fraud upon them even though at the time its retention seemed unnecessary.

<sup>13</sup> Hence the cases which purport to proceed on the trust theory, despite the fact that no trust should arise until after insolvency, have in general protected the corporate creditors by holding such transactions void as to them. *Crandall v. Lincoln*, 52 Conn. 73 (showing that the shareholder will not be permitted to retain the assets received, as a *bonâ fide* purchaser without notice); *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364. See *Hamor v. Taylor-Rice Engineering Co.*, 84 Fed. 392. But see *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226. And note the same result where dividends are paid out of the capital fund. *Fricke v. Angemeier*, 101 N. E. 329 (Ind.); *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, 141 N. W. 882. *Contra*, *McDonald v. Williams*, 174 U. S. 397.

<sup>14</sup> 1 COOK, CORPORATIONS, 7 ed., § 311; *Fraser v. Ritchie*, 8 Ill. App. 554; *Howe Grain & Mercantile Co. v. Jones*, 21 Tex. Civ. App. 198, 51 S. W. 24; *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656. In 1 MACHEN, MODERN LAW OF CORPORATIONS, § 626, it is argued that a fraud upon creditors occurs here, since the reduction of the amount of capital stock outstanding makes it possible for the corporation to thereupon reduce its assets to the point to which the capital has been reduced. This argument, however, assumes that stock purchased is retired and reduces the amount of capital which we have seen to be contrary to authority. See Note 4.

<sup>15</sup> No cases upon this point have been found. It is submitted, however, that there



however, a corporation having a surplus in hand purchased stocks outstanding by note. It was held that, on subsequent insolvency of the company the holder could not come in with general creditors to claim a dividend from the company upon his claim. *In re Fechheimer-Fishel Co.*, 50 N. Y. L. J. 2853 (C. C. A., 2nd Circ.). It is possible that there were elements of fraud in the transaction not fully disclosed by the report which justified this result. Unless there were such facts, if we concede the power of the corporation to purchase its own stock, there seems no reason why the creditors should have been allowed to avoid this transaction.

THE RIGHT TO TAKE FISH AND GAME IN NAVIGABLE NON-TIDAL WATERS. — Since it is often said that only those waters in which the tide ebbs and flows are navigable under the common law of England, it is important to observe carefully the technical meaning of the word navigable when so used. At an early date title to the land beneath the sea and tidal rivers was conceived to be in the king,<sup>1</sup> whereas title to the land under inland waters where the tide did not ebb and flow, was in the private riparian proprietors.<sup>2</sup> Perhaps because tide water in England included nearly all water navigable in fact, or because of the Lord Admiral's jurisdiction over shipping in tidal waters,<sup>3</sup> the term "navigable water" came to be loosely used as a synonym for tide water.

While no one can obtain absolute property in fish and game except by reduction to possession,<sup>4</sup> and therefore their ownership while uncaptured does not go with the realty; the right to take creatures *feræ naturæ*, transiently upon land, is recognized as a valuable property right incident to its ownership.<sup>5</sup> So in ancient times, the right to fish in the sea was the exclusive prerogative of the king as lord of the soil; but either by Magna Charta, or by the gradual encroachment upon royal prerogative as the representative character of the sovereign became recognized, the king's right to the sea came to be regarded as held in trust for the public, and the right to fish became free and common to all.<sup>6</sup> This right though arising independently of the public ownership of the soil, thus chanced here to be co-extensive with the right of navigation. In English non-tidal streams, however, the exclusive right of fishery is in the riparian proprietor of the soil.<sup>7</sup> Inasmuch as these inland waters

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is no fraud in the transaction as against creditors except as it releases the shareholder from individual liability and that creditors cannot set aside the transaction to any greater extent and cannot claim the purchase price received for the shares.

<sup>1</sup> HALE, *DE JURE MARIS*, cap. 4.

<sup>2</sup> *Ibid.*, cap. 1.

<sup>3</sup> See *Ilchester v. Raishleigh*, 61 L. T. N. S. 477, 479.

<sup>4</sup> See *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600.

<sup>5</sup> So that a statute requiring a license for non-resident hunters is unconstitutional as applied to non-resident landowners. *State v. Mallory*, 73 Ark. 236, 83 S. W. 955. And see cases cited in note 14, *infra*.

<sup>6</sup> See 2 FARNHAM, *WATERS AND WATER RIGHTS*, § 368.

<sup>7</sup> *Pearce v. Scotcher*, L. R. 9 Q. B. D. 162; *Smith v. Andrews*, [1891] 2 Ch. 678; *Murphy v. Ryan*, Ir. R. 2 C. L. 143. See *Reece v. Miller*, L. R. 8 Q. B. D. 626. As to fowling see *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139.

are subject to a public easement of navigation,<sup>8</sup> it is clear that the right to hunt and fish has no connection with the right of navigation, but is an incident of the land.

Thus in those American jurisdictions where the riparian abutter on a non-tidal stream owns to the *medium filum*<sup>9</sup> it should follow that on such streams the public have no right to take fish and game.<sup>10</sup> But the fact that the public right to take fish and game co-exists with the right of navigation in tidal or so-called "navigable" waters has led some courts to consider these rights inseparable.<sup>11</sup> Such a misconception is indicated in the result of a recent Wisconsin decision, holding that the public as an incident to the right of navigation, has a right to take game, over the privately owned bed of a navigable fresh water stream.<sup>12</sup> *Diana Shooting Club v. Hustling*, 145 N. W. 816 (Wis.).

Not only is there no historical connection between the right to hunt and fish and the right of passage, but there is also no basis on reason or analogy for the connection. Although other servitudes in the nature of easements may be annexed by custom or prescription to an easement of passage,<sup>13</sup> the right to take fish and game cannot be thus annexed because it is not an easement but a *profit à prendre*, which the public cannot acquire by customary or prescriptive user.<sup>14</sup> Aside from annexed incidents, a public right of passage upon land includes only those rights reasonably necessary for the enjoyment of the easement.<sup>15</sup> Accordingly one who uses a public way as a vantage ground for observing the training of horses in adjoining fields,<sup>16</sup> or for launching profanity at the ser-

<sup>8</sup> HALE, DE JURE MARIS, caps. 1, 2, & 3. The cases in the preceding note all concern waters navigable in fact.

<sup>9</sup> Kinkead v. Turgeon, 74 Neb. 573, 109 N. W. 744; Brown v. Chadbourne, 31 Me. 9; Farris v. Bentley, 141 Wis. 671, 124 N. W. 1003; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808; Webber v. Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469; Lattig v. Scott, 17 Idaho 506, 107 Pac. 47; Cobb v. Davenport, 32 N. J. L. 369; Middleton v. Pritchard, 4 Ill. 510; June v. Purcell, 36 Oh. St. 396.

<sup>10</sup> In some American jurisdictions where the bed of streams navigable in fact is owned by the state, the right of fishery is of course public. Carson v. Blazer, 2 Binn. (Pa.) 475. The rule applied to the Great Lakes is the same as that applied to tide waters. Ainsworth v. Munoskong Club, 153 Mich. 185, 116 N. W. 992; Lincoln v. Davis, 53 Mich. 375, 19 N. W. 103; Sloan v. Biemiller, 34 Oh. St. 492.

<sup>11</sup> Forrestier v. Johnson, 164 Cal. 24, 127 Pac. 156. In Ohio, seemingly, public fishing, but not public fowling, is incident to navigation. Winous Point Shooting Club v. Bodi, 20 Oh. Cir. Ct. R. 637.

<sup>12</sup> Art. 9, § 1, of the Wisconsin Constitution provides that navigable streams "shall be common highways and forever free . . . without any tax impost or duty therefor." Under this section a statute declaring a public right to take fish in all navigable streams had previously been held valid. Willow River Club v. Wade, 100 Wis. 86, 76 N. W. 273. It is submitted that this section applies only to navigation and that such a statute in effect is a deprivation of property without due process of law. See 2 FARNHAM, WATERS AND WATER RIGHTS, § 368 c; cf. Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685.

<sup>13</sup> State v. Laverack, 34 N. J. L. 201, 206.

<sup>14</sup> Gatewards case, 6 Coke, 59 b; Ordeway v. Orme, 1 Bulst. 183; Johnston v. O'Neill, [1911] A. C. 552; Smith v. Andrews, [1891] 2 Ch. 678; Murphy v. Ryan, Ir. R. 2 C. L. 143; Cobb v. Davenport, 33 N. J. L. 223; Beach v. Morgan, 67 N. H. 529, 531, 41 Atl. 349, 350.

<sup>15</sup> Woodruff v. Neal, 28 Conn. 165; Stackpole v. Healy, 16 Mass. 33; Cole v. Drew, 44 Vt. 49.

<sup>16</sup> Hickman v. Maisey, [1900] 1 Q. B. 752.



vient owner,<sup>17</sup> or for frightening<sup>18</sup> or shooting<sup>19</sup> his game, becomes a trespasser upon the servient tenement. And one in the pretended exercise of an easement of navigation over privately owned subaqueous land, who takes ice<sup>20</sup> from the surface or gravel<sup>21</sup> from the bed of the stream is likewise clearly a trespasser. The argument that as fish and game have no owner, anyone has a right to take them wherever he has a right to be,<sup>22</sup> is thus answerable in that the taker has no right on the highway for that purpose. On these grounds the majority of the courts have reached a result opposed to that of the principal case.<sup>23</sup>

THE DEVELOPMENT OF *WHITBY v. MITCHELL*. — The recent case of *In re Park's Settlement*, [1914] 1 Ch. 595,<sup>1</sup> contains a new application of the rule in *Whitby v. Mitchell*,<sup>2</sup> against limiting land to an unborn person for life, with remainder to the issue of that person, which, according to *In re Nash*,<sup>3</sup> is the modern English form of the old rule against a possibility upon a possibility. In *Park's Settlement*, land was limited (in the events that happened) to the use of John Foran for life, and after his death, if he left a widow surviving him, to the use of such widow for her life, and after her decease, if he left issue surviving him, to such issue or such of them as should attain the age of twenty-one years. John Foran was a bachelor at the date of the deed and afterwards married and had one child. His wife and child survived him, and on the death of his wife, the validity of the limitation to his issue was questioned on the ground that, as he, being a bachelor, might have married a lady unborn at the date of the deed, the limitation of a remainder to children who might be born of her as his wife, following a limitation to her for life, offended against the rule. Eve, J., held that the contention was well founded, and that the limitation to the issue was void. If this is a correct application of the rule, it seems to open up the way to new and unexpected catastrophes. It does not seem to be material that John Foran was a bachelor, for, if he had been married and his wife and child had been living at the date of the deed, it was possible that they might have died, and that another wife (unborn at the date of the deed) and another child might have survived him. And, if the child of the first marriage in fact survived, he could not take under the limitation, because, until the event, it was possible that he might have died, and a child of the second marriage, and not he, might have survived. As the

<sup>17</sup> *Adams v. Rivers*, 11 Barb. (N. Y.) 390.

<sup>18</sup> *Harrison v. Rutland*, [1893] 1 Q. B. 142.

<sup>19</sup> *The Queen v. Pratt*, 4 E. & B. 860; *L. Realty Co. v. Johnson*, 92 Minn. 363, 100 N. W. 94.

<sup>20</sup> *Washington Ice Co. v. Shortall*, 101 Ill. 46.

<sup>21</sup> *Archer v. Greenville Sand & Gravel Co.*, 34 Sup. Ct. 567.

<sup>22</sup> See dissent in *Sterling v. Jackson*, 69 Mich. 488, 519, 37 N. W. 845, 861.

<sup>23</sup> *Hunting—Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783; *Sterling v. Jackson*, 69 Mich. 488, 37 N. W. 845; *State v. Shannon*, 36 Oh. St. 423; *fishing—Hooker v. Cummings*, 20 Johns. (N. Y.) 90; *Adams v. Pease*, 2 Conn. 481.

<sup>1</sup> The case is also reported 58 Sol. J. 362.

<sup>2</sup> 42 Ch. D. 494, 44 Ch. D. 85 (1890).

<sup>3</sup> [1910] 1 Ch. D. pp. 9-10.

limitation must have been good or bad at the date of the deed, the subsequent events would not affect it. So a testator might devise land to a son for life, with remainder to his son's children in fee, and with power for the son to appoint a life estate to his widow in precedence of the remainder to the children. If the son were young at the testator's death, he would very likely marry a wife unborn at that time, and, if he exercised the power in her favor by appointing a life estate to her, the remainder to his children in fee would be rendered invalid. Lord Coke would probably have managed this better with his rule regarding common possibilities and double possibilities.<sup>4</sup> He would have said that, the remainder after the life estate of John Foran's widow, being limited, not to *her* children, but to *his*, was good, because it was only a common possibility that he might marry somebody and have issue surviving him, which would not have involved inquiring whether the widow was the mother or when she was born. He would not have been likely to think that this remainder was affected by the triple possibility of his marrying an unborn wife, and having issue by that wife, and leaving both the wife and such issue surviving him. Perhaps a similar course might have been followed with the modern form of the rule, on the ground that the case was not within the reason of the rule, even if it might possibly be within its words. The case has nothing in common with *In re Frost*,<sup>5</sup> which was referred to in the judgment, because there the remainder was limited, not to issue living at the death of the first life tenant, but to issue living at the death of the survivor of the husband and wife, or, in default of such issue, to other persons then to be ascertained, and there was no issue. Kay, J., thought that involved the double possibility of a marriage with an unborn person and of the contingency to take effect upon the death of that person. The rule in *Whitby v. Mitchell* seems inadequate to this case, although the remainder was clearly void according to the rule against perpetuities, if that rule was applicable, as Kay, J., also held that it was. On the other hand, the limitation in *Park's Settlement* was clearly valid according to the rule against perpetuities, and it vested at the same time as the widow's life estate and independently of it.

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## RECENT CASES.

**BILLS AND NOTES — DEFENSES — WAIVER OF DEFENSE BY EXECUTION OF RENEWAL NOTE.** — The defendant with knowledge of a right of recoupment for defective performance of a contract, gave a renewal note for the full amount of the original note. Any cross-action by the defendant was barred by the Statute of Limitations. *Held*, that the defendant cannot recoup his damages in an action on the renewal note. *Stewart v. Simon*, 163 S. W. 1135 (Ark.).

The proposition that a renewal note is subject to the same defenses as the original is not absolutely true. Where the original was tainted with illegality, the renewal note is no better. *Chapman v. Black*, 2 B. & A. 588; *Wynne v.*

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<sup>4</sup> 2 Rep. 51 b (1593); 1 Rep. 156 a (1598).

<sup>5</sup> 43 Ch. D. 246, 253 (1890).



*Callander*, 1 Russ. 293. Cf. *Flight v. Reed*, 1 H. & C. 703. The same is true when the defense is lack of consideration. *Commonwealth Ins. Co. v. Whitney*, 1 Metc. (Mass.) 21; *First National Bank v. Black*, 108 Ga. 538, 34 S. E. 143. As between the immediate parties to the instrument, these are absolute defenses. Other defenses, however, may be waived. Thus giving a renewal note with knowledge of the defense of fraud operates as a waiver of that defense. *Edison General Electric Co. v. Blount*, 96 Ga. 272, 23 S. E. 306; *White v. Sutherland*, 64 Ill. 181. The authorities also generally recognize that the execution of a renewal note, with knowledge of the defense, will operate as a waiver of the defendant's right to refuse full performance on his side of the contract because of the defective performance rendered by the other party. *American Car Co. v. Atlanta City St. Ry. Co.*, 100 Ga. 254, 28 S. E. 40; *Archer v. Bamford*, 3 Stark. 175; cf. *Kirkpatrick v. Muirhead*, 16 Pa. 117. The right of recoupment is a defense of this nature; and a waiver of it is therefore effective. See WILLISTON, SALES, § 605. This waiver alone, however, should not deprive the defendant of his affirmative cross-action or counterclaim for breach of contract. See WILLISTON, SALES, § 485. But the fact that the defense of recoupment has been waived becomes very material, when, as in the principal case, the Statute of Limitations has run against the affirmative right.

**CARRIERS — BILLS OF LADING — LIABILITY ON BILL AFTER DELIVERY OF GOODS.**—A short shipment was made under an order bill of lading. The plaintiff bank discounted a draft with the bill attached, although the bill was then three months old and had already been deposited with the bank on four successive occasions as security for drafts subsequently dishonored and taken up by the shipper. Prior to the last discount, the consignee had secured the goods from the carrier without surrendering the bill, and had paid the shipper. The bank sues the carrier. *Held*, that it cannot recover. *Fourth National Bank v. Nashville, C. & St. L. Ry. Co.*, 161 S. W. 1144 (Tenn.).

A carrier which issues an order bill of lading and then delivers the goods to one not the holder of the bill, is liable as a converter. *Boatman's Saving Bank v. Western & A. R. Co.*, 81 Ga. 221, 7 S. E. 125. Even if delivery is to the holder, failure to take up an order bill makes the carrier liable to a subsequent innocent purchaser. *Ratzer v. Burlington C. R. & N. Ry. Co.*, 64 Minn. 245, 66 N. W. 988; *Walters v. Western & A. R. Co.*, 56 Fed. 369. The reason for this liability is that the carrier has represented by leaving the bill outstanding that it is still backed by goods and should therefore reimburse an innocent purchaser of it for value. In the principal case in view of the short shipment, the long time the bill was outstanding and the dishonored drafts, the court seems right in saying there could have been no honest reliance on the carrier's representation. Estoppel therefore could not be invoked and the plaintiff could only rely on the consignor's right which, as he had received payment, amounted to nothing at the time of discount.

**CARRIERS — DISCRIMINATION AND OVERCHARGE: WHETHER EXTENSION OF CREDIT TO SOME BUT NOT ALL SHIPPERS CONSTITUTES DISCRIMINATION.**—The defendant railway company, departing from its regular course of business, did not require a regular monthly settlement from a coal company for the carriage of coal, but accepted notes. The railway renewed the notes and finally accepted in exchange three year debenture bonds. The railway was indicted: (1) for violating Sec. 6 of the Interstate Commerce Act in accepting a different compensation from the published rate; (2) for violating Sec. 2 of the Elkins Act which prohibits discrimination. *Held*, that the railway was properly convicted, at least as to the second count of the indictment. *Hocking Valley v. United States*, 210 Fed. 735 (C. C. A., 6th Circ.).

The case seems clearly right on the facts, since here the shipper was getting a

substantial advantage over other shippers. (See 26 HARV. L. REV. 82 for discussion of the same case in the lower court.) The case goes further, however, and contains language casting doubt upon the hitherto well-established doctrine that the mere fact that credit is extended to some shippers and refused others is not sufficient to constitute a discrimination. *Little Rock & Memphis R. Co. v. St. Louis & S. W. R. Co.*, 63 Fed. 775; *Gamble-Robinson Com. Co. v. Chicago & N. W. R. Co.*, 168 Fed. 161. See cases collected in notes, 21 L. R. A. N. S. 982, and 16 Anno. Cas. 613, 621. These cases were distinguished by the principal case on the ground that they were decided under the Interstate Commerce Act forbidding "unjust and unreasonable" discrimination, whereas this case arose under the Elkins Act from which the qualifying words were omitted. In order to support this case it would seem unnecessary to distinguish those cases, for here the advantage given the particular shipper was clearly unjust and unreasonable, since the carrier is practically furnishing capital to the favored shipper. Moreover it is submitted that even if the earlier cases had arisen under the Elkins Act, the result would have been the same, since the legal content of the term "discrimination" must include the elements of injustice or unreasonableness. On the one hand, it would create unnecessary inconvenience to shippers always to require payment in advance. On the other hand, it would be unfair and probably unconstitutional to require a railroad to give credit to all. *Attorney General v. Old Colony R.*, 160 Mass. 62, 35 N. E. 252. This latter objection, however, might perhaps be answered by requiring credit to be extended to all shippers furnishing a satisfactory bond. But this too affords ground for some discrimination. Therefore it is submitted that in the matter of extending credit, considerable freedom should be permitted the railroad and that only where, as in the principal case, there is a clear abuse, should a discrimination be declared.

**CARRIERS — LIMITATION OF LIABILITY — EFFECT OF FILING THE TERMS OF LIMITATION WITH THE INTERSTATE COMMERCE COMMISSION.**—The plaintiff at the start of an interstate journey checked her baggage without declaring its value. The defendant railroad had filed with the Interstate Commerce Commission a statement that its liability on baggage would be limited to one hundred dollars unless a greater value was declared by the shipper and excess charges paid. The trial judge found that the plaintiff had no notice of this regulation, and no inquiry was made by the railroad as to the value of the baggage. *Held*, that the plaintiff could recover only the limited amount. *Boston & Maine Railroad v. Hooker*, 34 Sup. Ct. 526.

For a discussion of the principles involved in this case see Page 737 of this issue of the REVIEW.

**CARRIERS — PASSENGERS: EJECTION OF PASSENGERS — FAILURE TO PRODUCE TICKET CAUSED BY FAULT OF CARRIER.**—A passenger on the defendant railroad, gave up his entire ticket to a uniformed employee on the first half of the journey, and was ejected by the conductor in charge of the second half for his consequent failure to produce the coupon when demanded. The passenger now sues for damages for the ejection. *Held*, that he can recover if his ticket was surrendered to an authorized agent, but cannot if the agent lacked authority to receive tickets. *Galveston, H. & S. A. Ry. Co. v. Short*, 163 S. W. 601 (Tex. Civ. App.).

If a passenger has lost his ticket he can be expelled. *Downs v. New York & N. H. R. Co.*, 36 Conn. 287. But if the coupon for the last half of the journey has been collected prematurely, there is a conflict of authority as to whether the passenger can be ejected by the conductor in charge during the final stage. Some states hold that he cannot be ejected. *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 63, 21 Atl. 97; *Kansas City, M. & B. R. Co. v. Riley*, 68 Miss.



765, 9 So. 443. Others hold that he can, and this seems the better view. *Townsend v. New York Central & H. R. R. Co.*, 56 N. Y. 295; *Skelton v. Lake Shore & M. S. Ry. Co.*, 29 Oh. St. 214. For the passenger is protected by his remedy for the loss of the ticket and the carrier's regulation requiring the production of tickets is justified in view of the impracticability of the conductor's passing upon the validity of excuses. *Bradshaw v. South Boston R. Co.*, 135 Mass. 407. The principal case suggests a modification of the first view based on a Texas statute requiring ticket collectors to wear a badge. It is arguable that delivery to an employee without a distinctive badge is negligence, but it would seem that in the ordinary course of travel a passenger would be justified in giving up his ticket to one in the company's uniform without looking for a badge or ascertaining if the badge were a proper one. The case would appear to set an unwarranted limitation on an undesirable rule.

**CONFLICT OF LAWS — REMEDIES: RIGHT OF ACTION — REDRESS FOR TORT COMMITTED UNDER STATUTE OF FOREIGN STATE WHICH FORBADE RECOVERY OUTSIDE THE STATE.** — An Alabama statute gave a right of action to workmen injured by reason of any defect of the premises where they were employed. ALA. CODE, § 3190. Section 6115 of the Code provided that actions for such injuries must be brought in a court of Alabama and not elsewhere. The plaintiff, having been injured, recovered against the defendant in Georgia. *Held*, that the recovery in Georgia was not in violation of the due faith and credit clause of the Constitution. *Tennessee Coal, I. & R. R. Co. v. George*, U. S. Sup. Ct., April 13, 1914.

As a general rule, an action for personal injuries is maintainable whenever the court has jurisdiction of the parties. *Dennick v. Railroad Co.*, 103 U. S. 11. See 26 HARV. L. REV. 283, 290. In creating a new right, however, the jurisdiction creating the right may place a special limitation upon it. This limitation affects the right no matter where sued upon. *Pollard v. Bailey*, 20 Wall. (U. S.) 520; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747. See 18 HARV. L. REV. 220, 221. The creator of the right may limit it even after it has arisen. *Davis v. Mills*, 194 U. S. 451. So in the principal case, Alabama might have made bringing a suit within the state a condition precedent to the existence of any right at all. That this was true of a statute of another state was the view of the minority of the court in *Atchison, T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, 71; See criticism of case in 22 HARV. L. REV. 535. But the Alabama statute would seem not to be capable of such an interpretation. Hence the requirement for bringing suit was not a condition precedent to the right, but only a prohibition which the dissenting judges in the case cited admitted could be disregarded. The court's result seems clearly right.

**CONSTITUTIONAL LAW — DUE PROCESS OF LAW — STATE REGULATION OF SALE OF STOCKS, BONDS AND OTHER SECURITIES.** — A statute provided that foreign and domestic investment companies file full data regarding all issues of stocks, bonds and other securities with a Commission, that the Commission was authorized to prohibit a sale if it should find that the sale would in all probability result in loss to the purchaser; and, further, that there should be no sale for thirty days after the data was filed with the Commission. *Held*, that the statute is unconstitutional. *Alabama & New Orleans Transportation Co. v. Doyle* 210 Fed. 173.

For a discussion of the principles involved see NOTES, p. 741.

**CONSTITUTIONAL LAW — POWERS OF LEGISLATURE: DELEGATION OF POWERS — VALIDITY OF STATE-WIDE REFERENDUM.** — The legislature passed a statute that was to become operative as a law if the majority of the people

voted for it at the next state election. *Held*, that such a statute is valid. *Hudspeth v. Swayze*, 89 Atl. 780 (N. J.).

The doctrine that legislatures cannot delegate their powers is well settled. *Territory v. Stewart*, 1 Wash. 98, 23 Pac. 405; *Slinger v. Henneman*, 38 Wis. 504. Decisions are in conflict, however, as to what constitutes a prohibited delegation. For historical reasons, it would seem, certain delegations to municipal corporations are valid. *State v. Tryon*, 39 Conn. 183. See *Paul v. Gloucester*, 50 N. J. L. 585, 603, 15 Atl. 272, 280. Local option laws have also generally been sustained. *Locke's Appeal*, 72 Pa. 491; *State v. Court of Common Pleas of Morris*, 36 N. J. L. 72. *Contra*, *Lammert v. Lidwell*, 62 Mo. 188. But the slight weight of authority is against the validity of state-wide referendum. *Barto v. Himrod*, 8 N. Y. 483; *Opinions of the Justices*, 160 Mass. 586. *Contra*, *Smith v. City of Janesville*, 26 Wis. 291. The courts in some of the above decisions have laid stress upon the diversity between the statutes, distinguishing between acts that purport to let a vote decide whether a law shall exist, and those that make its operation contingent upon the vote. But it is submitted that this is only a matter of form and does not warrant different results. Now statutes that are to become effective upon a contingency are clearly valid. *Pratt v. Allen*, 13 Conn. 119; *Home Ins. Co. v. Swigert*, 104 Ill. 653. The statute in the principal case seems clearly contingent, but it might be argued that the contingency was objectionable because it involved a delegation of legislative discretion if not of actual law-making power. But the statute is very analogous to local option laws, though such laws may be regarded as somewhat exceptional because the result of the vote, as an indication of the possibility of enforcing the law, is really a factor in determining the expediency of their enactment. Furthermore the delegation of some discretion is not unusual. *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349; *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367. Since in the principal case the legislature retained its power to give life to the law, and merely provided that the contingency making the law operative was the decision of the sovereign people instead of its own, the decision seems correct in holding this contingency unobjectionable. *Smith v. City of Janesville*, *supra*; *State v. Parker*, 26 Vt. 357. See dissenting opinion by Holmes, *Opinion of the Justices*, *supra*.

**CONTRIBUTORY NEGLIGENCE — "LAST CLEAR CHANCE" DOCTRINE — EFFECT OF CONCURRENT NEGLIGENCE OF THE PLAINTIFF.**— In an action for death caused by the negligence of the defendant's motorman, the trial court charged that if the motorman saw, or by due care could have seen that the decedent was unconscious of his danger, in time to avoid the accident by the exercise of reasonable care, the plaintiff could recover even though the decedent himself could have avoided the accident up to the instant of the injury. *Held*, that the instruction is erroneous, in that it allows recovery in a case of concurrent negligence where the defendant did not actually realize the danger. *Indianapolis T. & T. Co. v. Dary*, 103 N. E. 1098 (Ind. App.).

The "last clear chance" doctrine is properly applicable only when the defendant has a later opportunity than the plaintiff to avoid the accident by the use of reasonable care. *Nashua Iron etc. Co. v. Worcester & N. R. Co.*, 62 N. H. 159. See 26 HARV. L. REV. 369. Accordingly, in situations where the plaintiff himself could have prevented the injury up to the last moment by the exercise of due care, recovery should not be allowed, at least where the defendant's negligence involves only a failure to realize the plaintiff's danger. *Dyersen v. Union Pacific R. Co.*, 74 Kan. 528, 87 Pac. 680; *Southern Ry. Co. v. Bailey*, 110 Va. 833, 67 S. E. 365. But there is a growing tendency among the authorities to grant relief in spite of the plaintiff's coincident opportunity to avoid, when the plaintiff is merely inattentive to the danger and the de-



fendant actually appreciates the situation and negligently fails to avoid the accident. *Cavanaugh v. Boston & Maine R. Co.*, 76 N. H. 68, 79 Atl. 694; *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 74 Pac. 15; *Kelley v. Chicago, B. & O. R. Co.*, 118 Ia. 387, 92 N. W. 45. The plaintiff's own ability to prevent the injury makes it impossible to reach this result on any correct theory of "last clear chance." *Butler v. Rockland, T. & C. St. Ry. Co.*, 99 Me. 149, 58 Atl. 775; *Nehring v. Connecticut Co.*, 86 Conn. 109, 84 Atl. 301, 524. Of course, if the defendant's conduct were wilful or wanton, contributory negligence would be immaterial. *Aiken v. Holyoke Street Ry. Co.*, 184 Mass. 269, 68 N. E. 238. But when the defendant is merely negligent with reference to the danger, even when seen, the only ground for recovery appears to be that of the two concurrent negligences, the defendant's is the more culpable. This revival of the discredited doctrine of comparative negligence, if it is to be accepted at all, must certainly be limited, as in the principal case, to situations where the danger is actually seen by the defendant. For where both parties are merely inattentive, the comparison cannot be unfavorable to the defendant. Even in this form, however, the doctrine is a serious encroachment upon the defense of contributory negligence.

CORPORATIONS — CAPITAL, STOCK AND DIVIDENDS — RIGHT OF PREFERRED STOCKHOLDERS TO OBJECT TO EXTRAORDINARY DIVIDENDS.— The defendant corporation declared an extraordinary dividend on common stock from the proceeds of the sale of certain assets. Preferred stock was entitled to only four per cent dividends. The plaintiff, a preferred stockholder, seeks to enjoin the distribution as dividends on the ground that these assets were capital. *Held*, that the dividends are proper. *Equitable Life Assurance Society v. Union Pacific R. Co.*, N. Y. L. J. 25 (N. Y. Sup. Ct., April 2, 1914).

If dividends are proper, the directors have discretion whether to declare any or not. *McKean v. Biddle*, 181 Pa. 361, 37 Atl. 528; *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 38 N. E. 1126. It is generally stated that dividends cannot be paid out of capital, but only out of profits. See *In re Exchange Banking Co.*, 21 Ch. Div. 519, 526; *Painesville & Hudson R. Co. v. King*, 17 Oh. St. 534, 541. But to make the propriety of dividends depend on what might be called capital, and what profits, under various systems of bookkeeping, would be inexpedient. Hence the test actually adopted seems to be that, except for mining and similar corporations, dividends are proper when the assets of the company exceed the liabilities including outstanding stock. *Lubbock v. British Bank of South America*, [1892] 2 Ch. Div. 198; *Hazeltine v. Belfast & Mooshead Lake R. Co.*, 79 Me. 411, 10 Atl. 328. Dividends may be issued from this surplus whether it comes from income or sales of property increased in value. *Hazeltine v. Belfast & Mooshead Lake R. Co.*, *supra*; *Lubbock v. British Bank of South America*, *supra*. See *Mackintosh v. Flint & P. M. R. Co.*, 34 Fed. 582, 605. The rights of preferred and common stockholders *inter se* depend on the articles of association. *Elkins v. Camden & Atlantic R. Co.*, 36 N. J. Eq. 233; *Scott v. Baltimore & Ohio R. Co.*, 93 Md. 475, 49 Atl. 327. In the principal case the articles of association provided that the preferred stock should have no share in the "profits" above four per cent. This language would seem to require the same construction here as when used by the courts in determining the propriety of dividends. On winding up a corporation, it has been held that in the absence of express provision, the assets will be distributed equally between preferred and common shareholders. *Sumrall v. Commercial Building Trusts*, 106 Ky. 260, 50 S. W. 69; *In re North West Argentine Ry. Co.*, [1900] 2 Ch. 882. How the articles of association in the principal case would be construed as regards the division of assets in such a situation, is doubtful. But as the principal case concerned dividends, the decision seems clearly correct.

**CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — POWER OF CORPORATION TO PURCHASE ITS OWN SHARES — PURCHASE FROM SURPLUS ASSETS OF CORPORATION.**—The plaintiff, a shareholder in a New York corporation, sold his shares to the corporation and received a note in payment. At the time of the transaction the corporation was solvent and probably had a surplus sufficient to pay for the stock, but when the note matured after a renewal, the corporation was insolvent. The plaintiff seeks to prove for the note in bankruptcy proceedings. *Held*, that even if the corporation had a surplus when the note was given, the holder will be postponed to general creditors. *In re Fechlheimer-Fishel Co.*, 50 N. Y. L. J. 2853 (C. C. A., 2nd Circ.).

For a discussion of the power of a corporation to purchase its own shares, see page 747 of this issue of the REVIEW.

**CORPORATIONS — DISTINCTION BETWEEN A CORPORATION AND ITS MEMBERS — VALIDITY OF ASSIGNMENT FROM ONE CORPORATION TO ANOTHER COMPOSED OF SAME SHAREHOLDERS.**—The defendants fraudulently caused corporation A. to issue paid-up stock to themselves in exchange for overvalued property. While still ignorant of the fraud, A. conveyed all its assets to corporation B., which issued its own stock to A.'s stockholders. B. now sues the defendants in equity for an account of the profits of the original sale. *Held*, that B. cannot recover, as A.'s right to sue was not assignable. *United Zinc Companies v. Harwood*, 103 N. E. 1037 (Mass.).

Unless demanded by principle, this decision is unfortunate. A suit by corporation A. may be impracticable. Further, if any of B.'s stock has changed hands, a recovery by A. would not inure to the benefit of the present holders who in justice would be entitled to the proceeds. It might well be argued that the case is incorrect in holding that A.'s right to recover profits was not assignable. *Byxbie v. Wood*, 24 N. Y. 607; *cf. Cheney v. Gleason*, 125 Mass. 166. See POMEROY, REMEDIES AND REMEDIAL RIGHTS, 2 ed., §§ 144-153. But this misses the root of the difficulty, since the *ratio decidendi* of the case would lead to the same objectionable result if the claim was one of the class generally recognized as nonassignable. *Cutting v. Tower*, 14 Gray (Mass.) 183; *Illinois Land Co. v. Speyer*, 138 Ill. 137, 27 N. E. 931; *Milwaukee & Minnesota R. R. Co. v. Milwaukee & Western R. R. Co.*, 20 Wis. 174. Ever since a power to sue in another's name and retain the proceeds has been legally possible, there has been no solid objection to the assignment of any litigious claim — not for personal injuries — except the policy against champerty and maintenance. See *Prosser v. Edmonds*, 1 Younge & Collyer, 481, 497; *Rice v. Stone*, 1 Allen (Mass.) 566, 568; 3 POMEROY, EQUITY, §§ 1275, 1276. But an assignment which leaves the ultimate benefit of a suit where it was, does not promote strife. A court would scarcely refuse to remove one trustee and appoint another merely because some litigious right had become part of the trust-estate. And the court need violate no principle of corporation law to recognize the analogy here. Unquestionably, two corporations composed of the same shareholders are different persons for most purposes. They have different sets of rights, the act of one is not the act of the other, and the obligations of one are not enforceable against the other's property. But two entities may be distinct in respect to all these elements of personality, and yet be guided by a single mind, as where one individual holds two offices, or by a single group of minds, as here. It is not necessary, in order to preserve the real distinctions between the two corporations in the principal case, to insist on other distinctions which are not real. So far as their capacity to desire and enjoy benefits is concerned, they are the same. A distinction in this respect is really fictitious, and should be disregarded. *Washington Insurance Co. v. Price*, 1 Hopk. (N. Y.) 1; *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247.



**CRIMINAL LAW — TRIAL — FAILURE TO ARRAIGN DEFENDANT.** — The defendant was arraigned, entered a plea of not guilty to an information, was tried, and convicted. Upon appeal this conviction was reversed, and a new trial awarded. At retrial upon a different information, a motion to quash having been overruled, no formal arraignment and plea were had, but the defendant did not make specific objection at the time. The retrial resulted in a conviction, which was affirmed by the Supreme Court of Washington. *Held*, that the conviction was not without due process of law. *Garland v. Washington*, 34 Sup. Ct. 456.

This decision, that due process of law does not require that there be a formal arraignment and plea in order to sustain a conviction, is highly commendable, for it deprives the guilty defendant of another opportunity to evade justice by a technicality. The weight of authority, however, is clearly to the effect that ordinary criminal procedure requires this, on the ground that until arraignment and plea there is no issue to try. *People v. Corbett*, 28 Cal. 328; *State v. Fontenette*, 45 La. Ann. 902, 12 So. 937; *Crain v. United States*, 162 U. S. 625, (overruled by the principal case, at least as to the due process point). Or that any change is for the legislature and not for the courts. *State v. Vanhook*, 88 Mo. 105. But there is some authority in favor of the result of the principal case. *People v. Weeks*, 165 Mich. 362, 130 N. W. 697; *Hack v. State*, 141 Wis. 346, 124 N. W. 492. Whether these last cases would have been so decided in the absence of statutes allowing reversal only where the substantial rights of the party complaining have been affected, may be open to doubt. The rule in regard to misdemeanors is in accord with the principal case. *Allyn v. State*, 21 Neb. 593, 33 N. W. 212; *State v. Moore*, 30 S. C. 69, 8 S. E. 437. Furthermore, any objection that injustice was done to the accused in that he could not know with what he was charged until arraigned must be considered purely fictitious. The case marks an advance in criminal procedure.

**DEEDS — DELIVERY IN ESCROW IRREVOCABLE THOUGH NO CONSIDERATION GIVEN.** — The defendant, as a gift, deposited a deed in escrow to be delivered to the donee upon his performing a certain condition. Before performance, the defendant recovered the deed, and refused to deliver upon the plaintiff's tender of performance. *Held*, that the defendant will be compelled to deliver the deed. *Brown v. Albright*, 161 S. W. 1036 (Ark.).

A deed deposited in escrow to be delivered to the purchaser on payment of the purchase price cannot be *revoked* by the vendor. *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315. This has been explained as a result of the purchaser's right to specific performance of the contract. See article by Professor Bigelow, 26 HARV. L. REV. 565, 568. But the doctrine seems to be applied even where there is not a specifically enforceable contract. *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563. Delivery to the grantee will be considered as dating from the original delivery wherever this is necessary to support the validity of the deed. *Webster v. King's County Trust Co.*, 145 N. Y. 275, 39 N. E. 964. And on performance of the condition, no second delivery is necessary to the passing of title. *Hughes v. Thistlewood*, 40 Kan. 232, 19 Pac. 629; *Shirley v. Ayres*, 14 Ohio 307. Thus the doctrine would seem to rest wholly upon the ground that the deposit in escrow is a valid delivery, certain rights then vesting in the grantee, but that title will pass only on the stipulated contingency. See article by H. T. Tiffany, 14 COL. L. REV. 389, 394. On this ground it is held that a grantor cannot revoke an escrow deposited as a gift, the perfecting of which depends merely upon the lapse of time. *Stone v. Duvall*, 77 Ill. 475; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338. Nevertheless, where it depends upon the donee's performance of a condition, the transaction has been treated as a mere revocable offer. *Hoig v. Adrian College*, 83 Ill. 267; see *Mechanics Nat. Bank v. Roughton*, 78 N. Y. Supp. 800, 808. It is submitted that these

cases fail to recognize the significance of a delivery in escrow, and that the principal case is correct.

**EQUITY — JURISDICTION — APPOINTMENT OF RECEIVER IN AID OF JUDGMENT CREDITOR.**—The plaintiff judgment creditor was unable to secure execution because the defendant had deposited his furniture in a warehouse, and the warehouseman refused to point out the property. The plaintiff asked that a receiver be appointed. *Held*, that the relief will not be granted. *Morgan v. Hart*, 49 L. J. 112 (Ct. App. 1914).

The principal case is undoubtedly right. The appointment of a receiver in cases of this sort is by way of equitable execution, and is only to be resorted to when the remedy for execution at law is inadequate. *Harris v. Beauchamp Bros.*, [1894] 1 Q. B. 801. The appointment of a receiver to reach jewelry worn by the debtor is within this principle, for the sheriff cannot levy. *Frazier v. Barnum*, 19 N. J. Eq. 316. But in the principal case there was only the practical difficulty of compelling the debtor or the warehouseman to point out the property. It would seem that this could have been accomplished by the statutory remedy of discovery. See RULES OF THE SUPREME COURT, ENGLAND, Order XLII, r. 32, 33.

**EVIDENCE — DECLARATIONS CONCERNING INTENTION — POST-TESTAMENTARY DECLARATIONS OF TESTATOR ON ISSUE OF INTENT TO REVOKE.**—A will and a codicil written on a single sheet were found among the papers of the testatrix. The signature to the codicil, with a part of the will, had been cut out. To prove that this had been done with intent to revoke the will as well as the codicil, the contestant offered several declarations, made by the testatrix after the execution of the will, during a period of several years prior to her death. *Held*, that the evidence is admissible. *Burton v. Wyld*, 103 N. E. 976 (Ill.).

The authorities generally agree that post-testamentary declarations are admissible to support or rebut the ordinary presumption that a lost or mutilated will in the testator's custody has been destroyed with intent to revoke. *Keen v. Keen*, L. R. 3 P. D. 105; *Patterson v. Hickey*, '32 Ga. 156; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705. Declarations of the testator which accompany the act of revocation are admissible as part of the *res gesta*. *Glass v. Scott*, 14 Colo. App. 377, 60 Pac. 186. But in the absence of a special exception to the hearsay rule for post-testamentary statements, declarations subsequent to revocation must depend upon the hearsay exception which admits contemporaneous expressions of a material state of mind. *Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487; *Mutual Life Insurance Co. v. Hillmon*, 145 U. S. 285; *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N. E. 961. This exception should not extend to subsequent declarations offered to prove the act of revocation, for to permit inferences from present states of mind, made admissible by the exception, to past acts, would practically abrogate the hearsay rule, and is thus fundamentally objectionable. *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916; *Boylan v. Meeker*, 28 N. J. L. 274. *Cf. Throckmorton v. Holt*, 180 U. S. 552. See 26 HARV. L. REV. 146. But when the issue is the intent accompanying a presumed or admitted physical act of destruction, the only inference is from present to past intent, and there is, therefore, no use made of the mental state exception to avoid the whole hearsay rule. Later declarations of intent to revoke should then be admissible where clearly relevant, that is, if there is strong proof of a continuing intention running back to the time of the act. *Managle v. Parker*, 75 N. H. 139, 71 Atl. 637; *Behrens v. Behrens*, 47 Oh. St. 323; *Collagan v. Burns*, 57 Me. 449. *Contra, In re Kennedy*, 167 N. Y. 163, 60 N. E. 442. In the principal case, the declarations covered a considerable period of time, so that it was not unreasonable to infer



a continuous intention to revoke, in spite of the absence of positive proof that any of the declarations were made shortly after the act. *Waterman v. Whitney*, 11 N. Y. 157. See 3 WIGMORE, EVIDENCE, § 1737. It is difficult, however, to understand how this reasoning is open to the Illinois court, since it has expressly repudiated any mental state exception to the hearsay rule, at least in non-testamentary cases. *Siebert v. People*, 143 Ill. 571, 32 N. E. 431; *Chicago & E. I. R. Co. v. Chancellor*, 165 Ill. 438, 46 N. E. 269. The only other explanation for the principal case would seem to be a special hearsay exception, or at least a peculiar treatment of testamentary cases, taking its origin from the practice of the ecclesiastical courts. See *Marston v. Roe*, 8 A. & E. 14, 56; *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154, 241; *In re Skelton's Will*, 143 N. C. 218, 55 S. E. 705.

EVIDENCE — DYING DECLARATIONS — ADMISSIBILITY IN CIVIL SUITS. — In an action of contract by an executor, the court rejected the plaintiff's offer to prove his testator's dying declaration as to the terms of the agreement in controversy. *Held*, that the declaration should have been admitted. *Thurston v. Fritz*, 138 Pac. 625 (Kan.).

For a discussion of the historical basis and of the expediency of so extending the dying declaration exception, see this issue of the REVIEW at p. 739.

EVIDENCE — SIMILAR FACTS AND OCCURRENCES — OTHER CRIMINAL ACTS TENDING TO PROVE THE ACT CHARGED. — The defendant was indicted for the murder of a young girl who had been killed in the course of an attempt to commit what appeared to be an unnatural sexual crime upon her. A witness testified that on the day of the murder the defendant had said to him, "I want you to watch for me like you have been doing the rest of the Saturdays." He was then permitted to testify that he had watched on previous occasions, while the defendant had taken other girls to his office under similar circumstances. He further testified that he had seen the deceased go to the office, and subsequently he had helped the defendant remove her body; that at this time the defendant had said to him, "Of course you know I ain't built like other men." In explanation of this statement, the witness testified, that on several of the prior occasions he had seen the defendant in unnatural intercourse with other women. To the admission of the testimony as to what took place on these previous occasions the defendant excepted. *Held*, that the evidence is admissible. *Frank v. State*, 80 S. E. 1016 (Ga.).

It is a fundamental principle of the common law that one accused of crime must be tried only for the offense charged without reference to his past life or character. *Paulson v. State*, 118 Wis. 89, 98, 94 N. W. 771, 774; *People v. Shea*, 147 N. Y. 78, 99, 41 N. E. 505, 511. Evidence of other criminal acts which have no logical tendency to prove the crime charged, except as showing that the defendant has a disposition to commit such offenses, is inadmissible. *State v. Lapage*, 57 N. H. 245; *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319; *The King v. Rodley*, [1913] 3 K. B. 468. But where the evidence of other acts is relevant to any material point in issue, otherwise than through the inference to character, it is immaterial that the other acts are criminal. *State v. Lapage*, 57 N. H. 245, 288; *Parker, C. J.*, in *People v. Molineux*, 168 N. Y. 264, 339, 61 N. E. 286, 312; *Makin v. Attorney General*, [1894] A. C. 57. See also, 26 HARV. L. REV. 656. So, where the other criminal acts form part of the same general design, of which the act charged is but another manifestation, evidence of the defendant's connection with the other acts will be competent to show his connection with the crime of which he is accused. *Commonwealth v. Robinson*, 146 Mass. 571, 16 N. E. 452; *State v. Eastwood*, 73 Vt. 205, 50 Atl. 1077; *People v. Zucker*, 20 App. Div. 363, 46 N. Y. Supp. 766; *Affirmed*, 154 N. Y. 770, 49 N. E. 1102. But it seems scarcely possible to prove a general plan to commit sexual

offenses. Where, however, as in the principal case, there is a series of acts committed under such similar and peculiar circumstances as to point to the same person as the perpetrator of all, evidence of the accused's connection with the previous acts will be admissible to prove his connection with the act charged. *Parker, C. J.*, in *People v. Molineux*, 168 N. Y. 264, 344, 61 N. E. 286, 313; *Frazer v. State*, 135 Ind. 38, 34 N. E. 817. This would seem clearly so where the evidence is introduced to explain the defendant's own statement, referring to the previous occasions and indicating that he had a similar design in mind. See *Commonwealth v. Choate*, 105 Mass. 451. For this purpose all the testimony of the witness as to what took place on the other occasions when he had watched for the defendant was admissible. But the defendant's statement, "Of course you know I ain't built like other men," was relevant only through the inference to character, and the defendant's disposition to commit the crime charged cannot be shown even by his own admissions. *Rex v. Cole*, 1 Phillips, Evidence (4th Am. Ed.) 181; *People v. Bowen*, 49 Cal. 654; *Lucas v. Commonwealth*, 141 Ky. 281, 287, 132 S. W. 416, 419. But since there was no specific objection to the admission of this statement, it cannot be taken advantage of on appeal. *State v. Stanton*, 118 N. C. 1182, 24 S. E. 536; *Ray v. Camp*, 110 Ga. 818, 36 S. E. 242. See also, 24 HARV. L. REV. 148.

INSURANCE — CONSTRUCTION OF PARTICULAR WORDS AND PHRASES IN STANDARD FORMS — STANDARD MORTGAGE CLAUSE AS PROTECTION AGAINST OWNER'S NEGLIGENCE TO FURNISH PROOF OF LOSS. — A mortgagor took out insurance payable to the mortgagee as his interest might appear. The policy provided that "the insured" should furnish proofs of loss within a certain time, and that no act or neglect of the mortgagor should invalidate the mortgagee's right to recover. The mortgagor failed to furnish proofs of loss within the prescribed time. Held, that the mortgagee's recovery is not barred by this neglect. *Riddell v. Rochester German Ins. Co.*, 89 Atl. 833 (R. I.).

If the mortgagee's right is not protected by a provision in the policy, it will be defeated by any act or neglect which invalidates the mortgagor's contract. *Baldwin v. Phoenix Ins. Co.*, 60 N. H. 164; *Shapiro v. Western Home Ins. Co.*, 51 Minn. 239, 53 N. W. 463. The standard mortgage clause has sometimes been interpreted as making the mortgagee a peculiarly privileged beneficiary of the contract with the mortgagor. See 23 HARV. L. REV. 311. Under this analysis any misconduct of the mortgagor which rendered the contract void in its inception, would prevent any right in the mortgagee from arising. *Hanover Fire Ins. Co. v. Nat. Ex. Bank*, 34 S. W. 333 (Tex. Civ. App.). But the purpose of the clause was to protect the mortgagee against misconduct of the mortgagor at the inception as well as during the existence and after the termination of the risk. See *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 176, 177. This result is achieved by the weight of authority, on the theory that the clause creates a separate contract of insurance with the mortgagee. *Magoon v. Fireman's F. Ins. Co.*, 86 Minn. 486, 91 N. W. 5; *Bacot v. Phoenix Ins. Co.*, 96 Miss. 223, 50 So. 729. It would seem further that the mortgagee is not "the insured" within the meaning of the clause, requiring proof of loss in a specified time. The duty would be highly unreasonable if imposed upon one who might not know that there had been a fire until after the expiration of the period set. This, as the principal case holds, is one of the neglects against the effect of which the mortgagee's contract protects him. He should be entitled to recovery on proof of loss in a reasonable time after learning of it. See *Union Institution for Savings v. Phoenix Ins. Co.*, 196 Mass. 230, 235, 81 N. E. 994, 996.

INTERSTATE COMMERCE — CONTROL BY STATES — REGULATION OF INTERSTATE SHIPMENT OF INTOXICATING LIQUORS: WEBB-KENYON ACT. — In a suit



in equity to enjoin an express company "from transporting . . . or distributing liquors contrary to law" it was found that beer was shipped at various times *via* the defendant carrier from Illinois to a consignee in Iowa who did not hold a permit to sell intoxicants. An Iowa statute prohibits express companies, etc., to transport liquor to persons not holding permits. It was conceded that unless the Webb-Kenyon Act (which prohibits the transportation of liquors into a state to be used in violation of state laws) was constitutional, the petition for injunction must fail. *Held*, that the injunction should be granted. *State v. U. S. Express Co.*, 145 N. W. 451 (Iowa).

It is well settled that the Wilson Act, by which Congress deprived a shipment of liquor of its interstate character upon delivery to the consignee, is constitutional. *In re Rahrer*, 140 U. S. 545. But this Act does not apply until delivery by the carrier to the consignee has been completed. *Rhodes v. Iowa*, 170 U. S. 412; *Heymann v. Southern R.*, 203 U. S. 270. Adequate prevention of illegal selling may reasonably require regulation and restriction of transportation. *Cf. Louisville, etc. R. v. Cook Brewing Co.*, 223 U. S. 70. The Webb-Kenyon Act, entitled "An Act divesting intoxicating liquors of their interstate character in certain cases," purports to remove the last barrier to placing the complete control of the liquor traffic under the local police power. See 6 ME. L. REV. 292; 20 CASE AND COMMENT 448. The principal case assembles the arguments in favor of its constitutionality. It has been held to be constitutional in *State v. Grier*, 88 Atl. 579 (Del.). It is no more a delegation of power than was the act "forbidding the transportation of free negroes from one state to another where they were forbidden to reside"; 2 STAT. 205; or the act forbidding "the transportation of game killed in violation of local laws"; *Rupert v. United States*, 181 Fed. 87. See also 14 COL. L. REV. 321. Whether, in the absence of knowledge by the carrier of an intended illegal use by the consignee, the carrier has "an interest" in the shipment within the act, so that the transportation may be restricted, is subject to conflicting opinions. But the better view holds that the act includes the "consignor, common carriers, and other transporting agencies." *State v. Grier, supra*; 77 CENT. L. J. 437. *Contra, Adams Express Co. v. Commonwealth*, 157 S. W. 908 (Ky.). It has been held that the state legislation need not be reenacted to secure the benefits of the Wilson Act. *Commonwealth v. Calhane*, 154 Mass. 115, 27 N. E. 881; *In re Rahrer, supra*. The principal case seems correct in applying this analogy to the Webb-Kenyon Act. *Contra, Atkinson v. Southern Express Co.*, 78 S. E. 516 (S. C.). For a thorough discussion of the principles involved in the situation presented by the principal case, see 26 HARV. L. REV. 78 and 533.

LANDLORD AND TENANT — CREATION OF TENANCY FROM YEAR TO YEAR — HOLDING OVER BY RECEIVER. — The defendant was appointed receiver of a lessee company. He went into possession, paying rent in the stipulated installments, and continued to occupy the premises, and to pay rent, for seven months after the expiration of the term. *Held*, that only a tenancy at will was thereby created. *Dietrick v. O'Brien*, 89 Atl. 717 (Md.).

A holding over by a tenant after the expiration of a lease may be either an unlawful act or the result of a new agreement. If the former, it is generally recognized that the landlord has an option to regard the tenant either as a trespasser, or as a tenant from year to year. *Hall v. Myers*, 43 Md. 446; *Parker v. Page*, 41 Ore. 579, 69 Pac. 822. *Contra, Edwards v. Hale*, 9 Allen (Mass.) 462. This tenancy is imposed by law irrespective of the consent or intent of the tenant. *Conway v. Starkweather*, 1 Den. (N. Y.) 113; *Cavanaugh v. Clinch*, 88 Ga. 610, 15 S. E. 673. If, however, the holding over is in accordance with a new agreement, the new tenancy is only presumptively a periodic one, and its real terms, as well as its existence, are to be determined

by the actual intent of the parties, subject to the provisions of the Statute of Frauds. *Pusey v. Presbyterian Hospital*, 70 Neb. 353, 97 N. W. 475; *White v. Sohn*, 63 W. Va. 80, 59 S. E. 890; cf. *Bradley v. Slater*, 50 Neb. 682, 70 N. W. 258. It is submitted that even when the holding over is unlawful, the actual intent of the tenant, as evidenced by circumstances, should operate to negative any option in the landlord. Extreme cases have sometimes led to the practical recognition of this. *Herter v. Mullen*, 159 N. Y. 28, 53 N. E. 700. In the principal case, moreover, the lessor accepted rent from the defendant with knowledge that the latter, as receiver, would have no desire to prolong the tenancy beyond the indefinite period necessary for the winding up of the business. From these acts it is clearly possible to infer a new agreement. *Withnell v. Petzold*, 17 Mo. App. 669; *Abeel v. McDonnell*, 39 Tex. Civ. App. 453, 87 S. W. 1066. Therefore, whether the holding over be regarded as lawful or unlawful, the decision in the principal case seems correct.

**LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — PETITIONS FOR PARDON.**— A petition to the governor for a pardon contained the words, "The judge changed the venue of the case for the purpose of making the costs excessive." *Held*, that the publication is absolutely privileged. *Connellee v. Blanton*, 163 S. W. 404 (Tex. Civ. App.).

For discussion of the question raised see NOTES, p. 745.

**LIENS — GARAGE-KEEPER'S RIGHT TO LIEN FOR MAINTENANCE OF MOTOR-CAR.**— The keeper of a garage agreed with the owner of a motor-car to keep it in his garage, furnish a chauffeur, and maintain it in repair. The car was at the owner's disposal. *Held*, that the keeper of the garage has no lien for his charges. *Halton v. The Car Maintenance Co.*, 30 T. L. R. 275 (Chan.).

A common-law lien will attach to a chattel only when it has been improved by the labor and skill of the bailee. *Chapman v. Allen*, Cro. Car. 271. No lien then attaches in the principal case for the storage or for the services of the chauffeur. And since the incidental repairing was simply to maintain the chattel at the same standard, no lien attaches for that. *Miller v. Marston*, 35 Me. 153. However, by statute in America generally, a livery stableman is given a lien for the keep of animals. See 1 JONES, LIENS, § 646 *et seq.* It is submitted that the position of the garage owner is analogous, and affords a proper subject for legislation. See CONSOL. LAWS N. Y., LIEN LAW, § 184. The provision that the owner might take possession at any time is generally considered inconsistent with the existence of a lien at common law. *Forth v. Simpson*, 13 Q. B. 680; *Smith v. O'Brien*, 46 N. Y. Misc. 325, 94 N. Y. Supp. 673. But since this right is usually granted in contracts with livery stablemen or garage keepers, such a rule would practically nullify statutes giving them a lien. Accordingly, the statutory lien should exist in spite of this right. *Young v. Kimball*, 23 Pa. 193; *Heaps v. Jones*, 23 Mo. App. 617. The lien holder's rights, however, could not be set up to defeat the rights of third parties accruing while the owner was in actual possession. *Thourot v. Delahaye Import Co.*, 69 N. Y. Misc. 351, 125 N. Y. Supp. 827; *Vinal v. Spofford*, 139 Mass. 126.

**MASTER AND SERVANT — EMPLOYERS' LIABILITY ACTS — EFFECT OF ECONOMIC PRESSURE ON VOLUNTARY ASSUMPTION OF RISK.**— An employee complained of the defective condition of a certain appliance, and was told to use it or quit. He continued to work, and was injured. In an action under the Federal Employers' Liability Act, *held*, that whether the assumption of risk was voluntary was a question of fact for the jury. *New York, N. H., & H. Ry. Co. v. Vizvari*, 210 Fed. 118 (Civ. Ct. App., 2nd Circ.).

The overwhelming weight of American authority holds that a servant who



continues his employment with knowledge of unusual dangers caused by the employer's negligence, without receiving a promise to remove them, has as a matter of law, voluntarily assumed the risk. *Lamson v. American Axe & Tool Co.*, 177 Mass. 144, 58 N. E. 585; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495; but see 27 HARV. L. REV. 284. In England, however, whether or not the assumption was voluntary is a question of fact for the jury. *Smith v. Baker*, [1891] A. C. 325. And the jury may take into account the economic pressure on the servant caused by fear of losing his position. *Yarmouth v. France*, 19 Q. B. D. 647. See *Walsh v. Whiteley*, 21 Q. B. D. 371, 374. In adopting both phases of the English view, the principal case marks a material departure from previous federal decisions. *McPeck v. Central Vt. Ry. Co.*, 79 Fed. 590. Under Section 4 of the Federal Employers' Liability Act, if the employer's negligence consists in the breach of a statutory duty, the defense of assumption of risk is expressly excluded. U. S. COMP. STAT. SUPP. 1911, p. 1323. But where, as in the principal case, the negligence violates no statute, there has been some conflict as to whether or not the defense is still available. A recent United States Supreme Court decision, however, settled the dispute in favor of allowing the defense. *Seaboard Air Line Ry. v. Horton*, U. S. Sup. Ct. No. 691, April 27. See cases collected in 47 L. R. A. N. S. 38, 62. The decision in the principal case, however, will certainly reduce its application to a minimum, for as a practical matter the employee's assumption of risk will seldom be found truly voluntary.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — INJURY OCCURRING "IN THE COURSE OF" AND ARISING "OUT OF" EMPLOYMENT. — The deceased was engaged as a seaman under articles in which the Board of Trade compulsory scale of diet was struck out, and a provision that the crew should provide their own provisions substituted. The deceased went ashore for provisions and was drowned while returning. *Held*, that the accident did not arise out of the employment since there was no contractual obligation that deceased should provide his food. *Parker v. Owners of Ship Black Rock*, 136 L. T. J. 375 (Ct. App., Feb., 1914).

The deceased was employed as drayman continuously from eight A.M. till eight P.M., with no interval for meals. He left his team to get a glass of beer, and was killed by a motor car while returning. *Held*, that the accident arose out of the employment, since thus leaving the team was a reasonable incident thereof. *Martin v. Loebond & Co.*, 136 L. T. J. 402 (Ct. App., Feb., 1914).

The English cases have generally held an accident to arise "out of" the employment when it results from a risk incidental to the employment as distinguished from a risk common to all mankind. See 27 HARV. L. REV. 390. A sailor who must depend upon his own efforts to secure food seems, because of his employment, peculiarly subject to the risks attendant on going ashore. More doubtful is the unique character of the risk incurred by the drayman of injury from passing motor cars. It is, however, a risk incidental to his employment, and the more likely to happen by reason of the same; and allowing recovery seems fully in accord with the spirit of the legislation. For discussion of this question see article by Professor Bohlen in 25 HARV. L. REV. 328-348, 401-427, 517-547.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — WHETHER OCCUPATIONAL DISEASE IS A "PERSONAL INJURY." — As the result of continuous exposure to furnace gases in the course of his employment, the plaintiff contracted a disease which destroyed his eyesight. The Workmen's Compensation Act provided for compensation for "personal injury arising out of and in the course of the employment." *Held*, that the plaintiff is entitled to compensation. *In re Hurl*, 104 N. E. 336 (Mass.).

The principal case decides an important practical question. At common law, disease or injured health would sustain an action for personal injury if the other elements of tort liability were present. *Hunt v. Lowell Gas Light Co.*, 8 Allen (Mass.) 169. Accordingly, under the English Workmen's Compensation Act, a disease caused by the employment where there has been no perceptible contact, has been held to fall within the definition of personal injury. *Brintons v. Turvey*, [1905] A. C. 230. The phrase "by accident," contained in the English statute, has led to a qualification that the injury must be sustained on a particular occasion, the date of which can be fixed. *Broderrick v. London County Council*, [1908] 2 K. B. 807. In the absence of such words it would seem correct to permit recovery, as in the principal case, for a disease of gradual growth caused by the conditions of the employment.

**MORTGAGES — TRANSFER OF RIGHTS AND PROPERTY — WHETHER RELATIVE OF MORTGAGEE BUYING FROM PURCHASER WITHOUT NOTICE IS RELEGATED TO MORTGAGEE'S POSITION.**—The defendant church corporation gave the plaintiff a mortgage on certain property which was not recorded. A subsequent mortgage was given by the church, covering that property, and by certain members, covering their own property. This later mortgage was recorded and assigned to a *bonâ fide* purchaser who had no knowledge of the prior unrecorded mortgage. He later assigned to the other defendants, the brother and wife respectively of the mortgagor members. These assignees, without consideration, released the property of the members covered by the mortgage. *Held*, that the holder of the prior unrecorded mortgage, in preference to the holder of the recorded mortgage, may exact full payment of his mortgage debt out of the church property. *Rogis v. Barnatowich*, 89 Atl. 838 (R. I.).

The policy of recording statutes is to avoid unrecorded instruments only as against third parties without notice. *National Mut. Building & Loan Ass'n v. Blair*, 98 Va. 490, 36 S. E. 513. Accordingly, an unrecorded mortgage prevails against a subsequent recorded mortgage held by one with notice. *Matthews v. Everitt*, 23 N. J. Eq. 473. But it seems that the well-established proposition, that one who takes with notice is protected by the good faith of his assignor, should apply in the principal case. *Lowther v. Carlton*, 2 Atk. 242; see *Mott v. Clark*, 9 Pa. St. 399, 404; *Rutgers v. Kingsland*, 7 N. J. Eq. 178, 184. The court argues that this doctrine has no application here because of the equally well-recognized principle that one subject to an equity cannot better his position by re-acquiring through a *bonâ fide* purchaser. *Church v. Church*, 25 Pa. St. 278. But it is submitted that the mere fact of close relationship is not enough, that to create this situation, the reassignment, though nominally to a stranger, must be in substance to the party formerly holding with notice. The decision can, however, be rested on the doctrine of marshalling assets. Granting that the individual defendants are in the position of *bonâ fide* purchasers so as to give their mortgage priority, yet, in releasing their exclusive security with knowledge that the remaining security was probably insufficient to satisfy both claims, they have knowingly deprived the plaintiff of an equitable right to marshal them against the property so released. It is only fair, therefore, that their prior rights in the church property should be postponed to those of the plaintiff. *Jordan v. Hamilton County Bank*, 11 Neb. 499, 9 N. W. 654; *Gore v. Royse*, 56 Kan. 771, 44 Pac. 1053. See 18 HARV. L. REV. 453.

**PARDONS — EFFECT — FEDERAL PARDON AFTER FIRST CONVICTION NOT PREVENTING SUBSEQUENT CONVICTION AS SECOND OFFENDER.**—A statute provided that one who was twice convicted of felony should, upon a second conviction, suffer an increased penalty. The defendant received a pardon from



the President of the United States after his first conviction. He was subsequently convicted of another felony, and sentenced to increased punishment under the statute. *Held*, that no rights of the defendant under the Constitution of the United States are infringed. *Carlesi v. New York* (Supreme Court of the United States, April 6, 1914).

Having in earlier decisions squarely held that the increased penalty is in no sense a punishment for the prior crime, the United States Supreme Court seems clearly right in deciding that the defendant was not put twice in jeopardy for the same offense or deprived of any other right under the Federal Constitution. *McDonald v. Massachusetts*, 180 U. S. 311; *Graham v. West Virginia*, 224 U. S. 616. The Supreme Court properly refused to review the question as to the construction of the state statute. For a discussion of the question whether the state statute providing an increased penalty ought to be construed to cover the situation in the principal case, see 26 HARV. L. REV. 644 (on the same case in the lower court).

**PUBLIC SERVICE COMPANIES — VALUATION FOR RATE PURPOSES — "GOING VALUE" AS PART OF PRESENT VALUE.**—In a proceeding before the commission to fix the relator's rates, the question arose whether, in estimating the present value of the relator's property, an allowance should be made for going value. *Held*, that such an allowance must be made. *People ex rel. Kings County Lighting Company v. Willcox*, 104 N. E. 911 (N. Y.).

The principal case is an important addition to the law on going value for rate purposes, a subject upon which there has been considerable confusion. See NOTES, p. 744.

**SPECIFIC PERFORMANCE — DEFENSES — EFFECT OF THE PRESUMPTION OF DEATH UPON MARKETABILITY OF TITLE.**—In a suit for specific performance, the marketability of the vendor's title was attacked on the ground that there was a possibility of a curtesy interest in one who, if living, would be seventy-two years of age, but who had twenty-five years previously left home for the West. At the time he had been in good health and on good terms with his family and corresponded with them for two years after his departure, but then without explanation, communications from him suddenly stopped. All efforts to locate him had failed. *Held*, that specific performance will not be granted. *Cerf v. Diener*, 210 N. Y. 156, 104 N. E. 126.

Where one has been absent from home for seven years without being heard from, a presumption arises that the absentee is dead. *Stockbridge, Petitioner*, 145 Mass. 517, 14 N. E. 928; *In re Truman*, 27 R. I. 209, 61 Atl. 598. But this presumption is always rebuttable. *Flynn v. Coffee*, 12 Allen (Mass.) 133; *Policemen's Benevolent Ass'n v. Ryce*, 213 Ill. 9, 72 N. E. 764. Accordingly, the rule would not aid in deciding the marketability of a given title. *Chew v. Tome*, 93 Md. 244, 48 Atl. 701. See 21 HARV. L. REV. 374. For the commonly accepted principle is that if competent persons would have reasonable doubt concerning the vendor's title, a purchaser will not be compelled to accept a conveyance. *Pyrke v. Waddington*, 10 Hare 1; *Close v. Stuyvesant*, 132 Ill. 607, 24 N. E. 868; *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 105. And such reasonable doubt might exist in spite of the effect upon other issues of the presumption raised by the length and circumstances of absence. Decisions tend to recognize this. If, as in the principal case, the only evidence be unexplained absence, and the age of the absentee, if living, would not be beyond belief, the vendor cannot have specific performance. *Vought v. Williams*, *supra*; *Chew v. Tome*, *supra*. If, however, there be corroborative evidence, such as illness or exposure to danger, or the age of the absentee would be beyond belief, the title may be marketable. *Cambrelleng v. Purton*, 125 N. Y. 610, 26 N. E. 907; *McComb v. Wright*, 5 Johns. (N. Y.) 263.

**TAXATION — GENERAL LIMITATIONS ON THE TAXING POWER — FEDERAL AGENCY: TAXATION BY STATES OF BONDS OF A MUNICIPAL CORPORATION IN FEDERAL TERRITORY.** — In taxing the surplus of a savings bank in the state, the bonds issued by municipalities located in Indian Territory and in the Territory of Oklahoma were included. *Held*, that a tax on such bonds, issued by agencies of the Federal Government, is invalid. *Farmers etc. Bank v. Minnesota*, 232 U. S. 516, 34 Sup. Ct. 354.

The states cannot burden by taxes the exercise of federal functions. *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316. Conversely the federal government cannot tax agencies of the states. *Collector v. Day*, 11 Wall. (U. S.) 113. This implied restriction on the taxing power of the sovereignties under the Constitution is due to the conception that both the state and the nation in its sphere must be entirely free of control by the other. See 1 COOLEY, *TAXATION*, 3 ed., 129 *et seq.*; COOLEY, *CONSTITUTIONAL LIMITATION*, 7 ed., 682. This exemption, however, only extends so far as is necessary to protect the efficient exercise of the power in question, — it is not enough that the property merely belong to a federal agency. Thus the exemption does not cover property owned by a railroad company incorporated by the United States though it would vitiate a tax on its operation. *Railroad Co. v. Peniston*, 18 Wall. (U. S.) 5. See 23 HARV. L. REV. 380. Similarly it might be argued that there is no substantial interference with the borrowing power of the United States in the taxation of the bonds of municipalities in federal territory and that, therefore, such bonds fall without the exemption. But it is settled that property owned by a municipality within a state cannot be taxed by the federal government since it is part of the machinery directly used by the state in carrying on its governmental functions. *United States v. Railroad Co.*, 17 Wall. (U. S.) 322. Furthermore, bonds of a state municipality are not to be included in estimating a Federal Income Tax assessed against the holder. *Pollock v. Farmers Loan & Tr. Co.*, 157 U. S. 429, 584. The principal case is merely the converse of this latter case and therefore seems clearly right. To allow a tax upon the bonds would impair the borrowing power of the governmental agency. However, a distinction might be drawn between bonds issued by a municipality in its capacity of a governmental facility, and those issued in the exercise of its private undertakings, for example, the building of a water works. *Cf. South Carolina v. United States*, 199 U. S. 437, 26 Sup. Ct. 110.

**TORTS — UNUSUAL CASES OF TORT LIABILITY — DAMAGE FROM NATURAL CONDITION OF ADJOINING PREMISES.** — A tree which had grown naturally on the defendant's land, decayed and fell upon the plaintiff's house. The plaintiff had warned the defendant of the condition of the tree. *Held*, that he may not recover. *Reed v. Smith*, 27 West. L. R. 190 (Ct. App., Brit. Col.).

The responsibility of a landowner for damage from acts which he does upon his property ranges from absolute liability at the one extreme to entire impunity at the other. *Fletcher v. Rylands*, L. R. 1 Ex. 277; *Middlesex Co. v. McCue*, 149 Mass. 103, 21 N. E. 230. Lord Holt said it was an indictable nuisance for an owner to permit the natural condition of his premises to injure his neighbor. *King v. Wharton*, 12 Mod. 510. His authority has been accepted in only one modern case. *Proprietors of Margate Pier v. Margate*, 20 L. T. R. N. S. 564. Even in England, where the law is not so impregnated with the doctrine that fault is essential to liability as in the United States, the courts refuse to hold the landowner unless his act has contributed to the condition. *Giles v. Walker*, L. R. 24 Q. B. 656; *Hodgson v. York*, 28 L. T. R. N. S. 836. American authority also unanimously supports the principal case. *Mohr v. Gault*, 10 Wis. 513; *Roberts v. Harrison*, 101 Ga. 773, 28 S. E. 995; criticized in 12 HARV. L. REV. 63. The superior practical wisdom of Lord Holt's position is impressive in view of results like the principal case. If



the owner takes advantage of his undoubted right to refuse the injured party access for purposes of self-help, he should be under a reciprocal affirmative duty to remove the cause of damage himself.

WATERS AND WATER COURSES — PUBLIC RIGHTS — RIGHT TO TAKE FISH AND GAME ON A NAVIGABLE NON-TIDAL STREAM.— The plaintiff, owner of the bed of a navigable non-tidal stream, seeks to enjoin a member of the public from hunting from a boat on that part of the stream which is over the plaintiff's land. *Held*, that the injunction will not issue. *Diana Shooting Club v. Husting*, 145 N. W. 816 (Wis.).

For a discussion of the right to fish and hunt in non-tidal waters see this issue of the REVIEW, p. 750.

WITNESSES — COMPELLING TESTIMONY — SUBPÆNA DUCES TECUM TO COMPEL PARTNER TO PRODUCE PARTNERSHIP PAPERS FROM FOREIGN JURISDICTION. — A *subpæna duces tecum* had issued against the defendant, a partner in a firm doing business in New York and Paris, to appear as a witness before the grand jury and bring with him certain checks then retained in the Paris office. Although the checks would have been forwarded on request, the defendant failed to make any reasonable efforts to produce them. *Held*, that the defendant is in contempt. *In re Munroe*, 210 Fed. 326 (Dist. Ct., Mass.).

To enforce a *subpæna duces tecum* it is essential that the document be within the witness' control. *Amey v. Long*, 9 East 473. But if he is the legal possessor, he need not have the actual custody. *Steed v. Cruise*, 70 Ga. 168. Thus the precise locality of the document is unimportant and it is of no consequence that it happens to be in a foreign jurisdiction. *In re Consolidated etc. Co.*, 80 Vt. 55, 66 Atl. 790; *Holly Mfg. Co. v. Venner*, 86 Hun (N. Y.) 42. So if the defendant had been the sole owner of the checks, he was clearly in contempt. Nor should the fact that the checks were partnership property necessarily alter the case. On the aggregate theory of partnership each partner has complete control of the firm property subject to the rights of the others. PARSONS ON PARTNERSHIP, 4 ed., § 255. Or if the "firm" is considered a distinct entity, each partner enjoys the same control, not as joint-owner but as a general agent. PARSONS ON PARTNERSHIP, 4 ed., § 46. This latter conception is similar to that of a corporation. See *Walker v. Wait*, 50 Vt. 668, 676. And a *subpæna duces tecum* will issue against an officer who has control of a document belonging to the corporation. *Nelson v. United States*, 201 U. S. 92, 115. See also *Lorenz v. Lehigh Navigation Co.*, 5 Leg. Gaz. (Pa.) 174. Of course if the other partners refuse to relinquish the papers, the *subpæna* cannot be enforced. See *Attorney General v. Wilson*, 9 Sim. 526, 529. But where, as in the principal case, the *subpænaed* partner could have produced the documents by an honest effort, yet unreasonably refused, he should be in contempt. *United States v. Collins*, 145 Fed. 709. To require service on every partner would often lead to a failure of justice and should be unnecessary.

## BOOK REVIEWS.

COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES. By Burr W. Jones, Rewritten, Enlarged and Brought with Authorities up to the Present Date by L. Horwitz. Volumes 1 to 5. San Francisco: Bancroft-Whitney Company. 1913, 1914. pp. xxvi, 1031; x, 1071; x, 1036; ix, 976; vi, 1157.

If the editor of the 16th edition of Greenleaf (already Wigmore on Evidence more truly than Taylor on Evidence ever earned its name) had felt warranted

in discarding brackets and leaving the reader to tell the voice of Wigmore from the voice of Greenleaf by ear, he would have banished parts of the text beyond the appendix. Professor Greenleaf himself would certainly have omitted some parts and recast others; for the best book must contain passages that outlive their usefulness, to say nothing of mere errors. Whatever reasons forbid such liberties to another hand forbid yet more peremptorily any blurring of the line between original text and additions. The author's rights are indeed within his own disposition if he be still living, but the reader's are not; and if he has a right to the old text he has a right also to the means of identifying it without the aid of a detective. If, on the other hand, it is to be cut up into unrecognizable fragments and these imbedded in a mass of new matter, what sanctity have the *disjecta membra* which should prevent the editor from remoulding or rejecting them as suits his purpose?

Such, however, is not the theory on which the present work has been prepared. Practically the whole text of Jones on Evidence in its second edition seems to have been preserved *verbatim et literatim*; yet Mr. Horwitz's additions, which more than double its size, are so fused with the original that the reader has nothing but internal evidence to tell him whether he is listening to Professor Jones in 1896 (or 1908) or Mr. Horwitz in 1913. And the care which shows itself throughout the revision is manifest in the welding of the joints.

This method is to be regretted. To say nothing of considerations of style, or the rights of readers, the editor is painfully cramped. The attempt at revision by addition and multiplication alone, without subtraction, compression, or rearrangement, puts the workman in a straitjacket; and diligently and skilfully as Mr. Horwitz has worked, he has been compelled to some odd and amorphous results. After a careful exposition of a new topic, for example, he finds himself obliged to work in Professor Jones's opening sentence on the same subject, with nothing to account for the inevitable repetitions; or coming upon material which needs reënforcement he must needs patch it with a passage like this, neatly stitched at the edges to match the older fabric:

"Here again the term, 'part of the *res gestæ*,' is applied to such declarations, and to such as come under the head of narrative statements; whereas in fact the admissibility rests upon the exercise of the powers of the agent within the scope of his authority. While so far the consequences of treating such declarations of agents under both heads has not resulted in any demonstrable harm, we think that time would be economized if the discussion were excluded altogether from the realm of *res gestæ*, and confined to treatment as suggested by Thayer, under the general rule of evidence applicable to agency."

Subject to such criticisms on its general method, the work is entitled to praise. A sensible and useful book, with a convenient arrangement, and a better separation than is sometimes found between the things which do and those which do not belong in a treatise on Evidence, has been revised with care and intelligence. To be sure, Mr. Horwitz does not always show the enlightened vision which the earlier part of his work leads us to expect. The archaic use of Bacon's maxim, for example, is disappointing; and so is such a deliverance as this:

"The idea of the *res gestæ* presupposes a main fact or principal transaction, and the *res gestæ* mean the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character."

Often he has failed to profit as he should by the light that shines from Professor Wigmore's pages. But he has done his work with great pains and with a praiseworthy regard for the practitioner's convenience. Some fifty thousand cases,



including the latest, are made accessible; and while the increase from less than fifteen hundred to more than five thousand pages contains matter which a better scheme of revision would have rejected, skilful bookmaking has combined agreeable type with economy of bulk.

One of the good features of the book is the hope it gives that Horwitz on Evidence will come next, as Wigmore followed Wigmore's Greenleaf, and Chamberlayne Chamberlayne's Best. When Mr. Horwitz applies his evident abilities to this task, freed from embarrassing limitations, he will do well to remember that compression is the greatest, as well as the most difficult, service he can render the profession. Anybody can write a long book on a subject he is full of; only a master can write a short one and make it first-rate. Remembering that we have already a treatise on Evidence which is great both in quality and dimensions, he should set before himself as an ideal that excellence which increases in direct ratio with brevity.

E. R. T.

THE LIFE AND CORRESPONDENCE OF PHILIP YORKE, EARL OF HARDWICKE, LORD HIGH CHANCELLOR OF GREAT BRITAIN. By Philip C. Yorke. Vol. I, pp. xvi, 685; Vol. 2, pp. viii, 508; Vol. 3, pp. viii, 653. Cambridge University Press — University of Chicago Press, 1913.

At last we have an adequate life of the great chancellor. Excepting the political lampooners of his own age, who served up the subject in their own style, the first biographer of Hardwicke was Campbell, who did his worst; and Campbell's interpretation of the contemporary pamphleteers has been the basis of most subsequent sketches. Even the article on Hardwicke in the last edition of the *Encyclopedia Britannica* is based largely on Campbell's life, though in the article on Campbell in the same publication it is said that the execution of his Lives was wretched, that one of the chief faults was "the hasty insinuations against the memory of the great departed who were to him as giants," faults "painfully apparent in the lives of Hardwicke" and others. In addition to Campbell's life, there was a mediocre performance by George Harris; and a short sketch by Foss in his *Biographia Juridica* which is fair and independent. It was only in 1900, when the Hardwicke papers were purchased by the British Museum, that an authoritative biography became possible.

This work is painstaking and accurate. It is not a great biography. It lacks literary graces; its treatment of Hardwicke's great service to his race, the development of equity, is entirely inadequate; and the plan of segregating the correspondence of a period after the narrative, instead of weaving it into the text, is better adapted to a source-book than to a work of literature. Yet if the book misses greatness it does so by a rather narrow margin. The work has distinct merit. The author shows industry, judgment, fairness, and enthusiasm; he succeeds in making his hero a real human being, a good man; he allows us to follow sympathetically the fortunes of a typical English man of law. It is fortunate that Hardwicke, in what must long remain his standard biography, has been so truly and so lovingly portrayed.

Classic taste, restrained feelings, moderate opinions, simple pleasures, personal politics, nothing unbridled but the bitterest defamation of political rivals; these were characteristics of the England of 1720 to 1760, the England of Philip Yorke, Earl of Hardwicke, Lord Chancellor of England for nearly twenty years. And Hardwicke was suited to his age, as he must have been to live so successful a life. He was handsome, polished, tactful, moderate. The son of a country attorney in modest circumstances, he made useful friends of his fellow-students, his dinner-companions, his mere acquaintances; they

started him in life, and a start was all he needed to attain success. Macclesfield's favor gained him his practice; and he showed his gratitude a few years later, by refusing, as Attorney General, to take part in Macclesfield's impeachment. Walpole secured his support, made him Chief Justice of England, and afterwards Chancellor. After Walpole's death, he remained a leading member in the cabinet under the Pelhams; he brought Pitt into the government, but upon the fall of Newcastle he resigned the seals, though he afterwards, for a few months, returned to the cabinet; upon the overthrow of his party on the accession of George III he retired to the country; and died, full of years and honors, in 1764. He had married well. He had five sons and two daughters. His eldest son and successor made a great marriage; his second son won great success at the bar, and was himself chancellor for a few hours before his tragic death; his third son was distinguished in the army and in diplomacy and earned his peerage; his fifth son became a bishop; both daughters made good marriages. A smooth life his, surely, and one of classical perfection. But as a child of his age he could not escape political slander; and it is one of the great merits of this book that it has once and for all disproved the entire brood of calumny.

Every lawyer who venerates the makers of the law, who believes that the personality of a judge determines the nature of his service to the development of law, who believes that the chancellor's conscience really moulds the doctrines of chancery, should read in these pages the life of the man who more than any other impressed upon equity the moral standards of a judge who was as good as he was great.

MANUAL OF EQUITY. By John Indermaur and Charles Thwaites. Seventh edition. London: Furnival Press. 1913. pp. xxxii, 620.

If there were any doubt to-day of the service which study of cases in the law schools has rendered to the science of law in America, it should be dispelled by examination of the books from which the English student is taught by the older method. For instance, in the present work in the year 1913 we are told: "In all cases in which specific performance is sought, the remedy, if it exists at all, must be a mutual one." (P. 318).

A little further on we are told: "But where a contract required by the Statute of Frauds to be in writing is signed by only one party, the person who has signed may be sued for specific performance, although it is evident that he could not himself sue, for as regards the other party the requirements of the Statute have not been complied with. This is apparently an exception to the ordinary rule requiring mutuality, but when closely examined, it is not really an exception. The Statute of Frauds only requires the agreement to be signed by the party to be charged; and when the other party sues, he must submit to perform his part of the contract, and so affirms his liability under it, and makes the remedy mutual." (Pp. 319-320).

That there are some seven other exceptions to Fry's doctrine of mutuality of remedy and that the doctrine itself is, to say the least, thoroughly moribund is nowhere suggested.

Again we are told: "The doctrine of the court with regard to equitable waste may also be referred to as a further example of a trust which may be said to be raised either by force of probable intention, or by reason of the determination of the court to enforce right and justice. True, the estate is given to the tenant for life without impeachment for waste, but as an estate is given in remainder it could not have been the intention of the settlor to allow the tenant for life to devastate the estate, and a trust is, therefore, raised in the



remainderman's favour, founded on the unexpressed, but yet, under the circumstances, fairly to be presumed intention. Neither would it be just or right to allow the tenant for life to devastate the property." (P. 66.)

If this were a trust, one would think the doctrine of the *locus pœnitentie* of the trustee would apply and so the trustee, who has committed a breach, might sue to get back that which represents the trust *res*. This, however, cannot be done. *Wentworth v. Turner*, 3 Ves. Jr. 3.

Many other like examples might be cited. It is enough to say that the present book in its seventh edition is still speaking the language of the first and that the results of the more thorough study of the cases which has gone on in recent years have made little impression upon it. This is the more strange since in such elementary books as Ashburner On Equity, for instance, such subjects as mutuality of remedy are handled in quite a different way.

As a clear, concise and well-written statement of what the books used to say about equity, much may be said for this book. The present edition also seems to have been well done in the respect that the latest important decisions have been judiciously selected and put in appropriate places. But it seems a pity that a subject of such importance should be presented to students at this late day with so little attention to the work of the scholars who have replaced the traditional notions of the era of Story's Equity Jurisprudence by system and science.

R. P.

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A CONCISE TREATISE ON PRIVATE INTERNATIONAL JURISPRUDENCE, BASED ON THE DECISIONS IN THE ENGLISH COURTS. By John Alderson Foote. Fourth Edition, by Coleman Phillipson. London: Stevens and Haynes. 1914. pp. xlv, 595.

This is a standard treatise, first published over thirty years ago (1878). It is not intended to be an elaborate philosophical treatise, like Professor Dicey's; but, on the other hand, it is not at all a mere student's cram-book. It has not the qualities of an elementary discussion of the subject. It is just what it purports to be; a collection for lawyers of the decisions bearing upon private international law, so-called.

Such a working treatise for lawyers may be expected to possess certain characteristics. It should have a sensible and natural analysis; it should contain all the cases; and it should discuss the cases in a manner to illuminate the decisions, to reconcile apparent conflicts, to remove difficulties, to clear up obscurities, and to sift out the significant language from hasty or ill-considered dicta. The first two characteristics this work possesses. The analysis is good, and the collection of cases is fairly exhaustive. In a few cases the discussion perhaps lacks something in perspicuity. It is a little hard, for instance, to get at the author's conclusion on the question of capacity. His treatment of the puzzling cases on the validity of marriage does not furnish any clue to the puzzle; indeed, his examination of the case of *Brook v. Brook* is not at all satisfactory. His treatment of the law of matrimonial acquets, and of the surprising cases of *De Nichols v. Curlier*, also leaves much to be desired.

These, however, are not fair specimens. The greater part of the book is excellently done, the cases intelligently discussed, and the result of them fairly and clearly stated. The book ought to be of great use to an American lawyer, while it cannot supplant Professor Dicey's more ambitious work; for though our authorities often depart from those of the English courts, no lawyer can feel himself familiar with the American law without some knowledge of the English cases.

J. H. B.

**THE JUDICIARY AND THE PEOPLE.** By Frederick N. Judson. New Haven: Yale University Press. 1913. pp. 270.

As the title indicates, this is not a law book. It is, however, a book of interest to lawyers. It begins with a discussion of the independence of the judiciary and the separation of the powers of government, and then by an easy transition passes to the relation of the judicial to the legislative power. In this earliest part of the book, the ground covered and the authorities used are much the same as in the first chapter of Thayer's *Cases on Constitutional Law*, with the addition, however, of matter indicating how it has happened that in the countries of continental Europe the doctrine of separation of powers has been so construed as to free the legislative and executive departments from control by the ordinary courts (pp. 18-23, 45-47, 54-56, 86-87). The book then discusses the judiciary in the United States and the recall of decisions and of judges. Here the more striking passages deal with the anomaly of framing the federal judiciary act in such ways as to cause the favorable decisions of state courts as to federal questions to be free from review by the Supreme Court of the United States (pp. 142-145), and with the comparatively liberal attitude of the United States Supreme Court towards the exercise of police power by the states (pp. 145-149). The view elaborated as to recall of decisions or of judges is the view commonly termed conservative, and it is presented skilfully. The book concludes with a discussion of the need of reform in judicial procedure. Here again the tone is conservative, the suggestions not going beyond those with which the members of the American Bar Association are well acquainted. Yet, notwithstanding lack of novelty, this part, like the others, is well worth reading as a presentation of important matter by a lawyer unusually scholarly and clear.

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**HISTORY OF ROMAN PRIVATE LAW.** Part II, Jurisprudence. Vols. I and II. By E. C. Clark. Cambridge, England: Cambridge University Press. 1914. pp. xiv, 802.

**THE MECHANICS OF LAW MAKING.** By Courtenay Ilbert. New York: Columbia University Press. 1914. pp. viii, 209.

**COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES.** Vols. IV and V. By Burr W. Jones. San Francisco: Bancroft-Whitney Company. 1914. pp. ix, 976, 1157.

**A SHORT HISTORY OF FEUDALISM IN SCOTLAND.** By Hugh B. King. Glasgow: William Hodge and Company. 1914. pp. xxvii, 242.

**THE LAW OF ASSOCIATIONS.** By Herbert A. Smith. Oxford: Oxford University Press. 1914. pp. xv, 168.

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#### LISTS OF SUBJECTS OF AMES COMPETITION BRIEFS CONTAINED IN THE HARVARD LAW SCHOOL LIBRARY.<sup>1</sup>

AGENCY — Ratification of a fire insurance policy after loss.

BILLS AND NOTES — Recovery by bank of money paid in cashing a forged and a raised cheque.

CONFLICT OF LAWS — Decree of divorce ordering conveyance of land in another state as alimony; does it bind courts of situs?

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<sup>1</sup> See this issue of the REVIEW at page 737.



CORPORATIONS — Right of a director interested in a contract of the corporation to vote as shareholder to ratify the contract.

ELECTIONS — Plurality of votes cast for a disqualified person. Right of next highest candidate to the office.

EQUITABLE CONVERSION — If the purchaser in an option contract dies, should his heir or his executor exercise the option?

EQUITABLE JURISDICTION — A street railway has a contract with a labor union and its members; will equity enjoin a threatened strike?

EVIDENCE — Hearsay rule — Declarations of intention as to contents of a will.

FRAUDULENT CONVEYANCES — If an insolvent insures his life and the premium is paid by a friend, can the creditors of the insured get the proceeds of the policy?

INTERPLEADER of two tax-collectors seeking to tax the same personalty.

LARCENY — Asportation — Defendant changes label on chattel held by carrier who consequently delivers to defendant.

LIMITATIONS — A debt and the mortgage lien thereunder are both barred by the Statute of Limitations; can the mortgage be revived by the mortgagor's grantee, who was never liable on the debt?

MISTAKE — Failure of written covenant in lease to express material part of oral contract. Reformation or rescission.

PUBLIC SERVICE COMPANIES — Exclusive privilege granted by terminal company to cab company to solicit patronage.

PUBLIC SERVICE COMPANIES — Carriers — Ejectment of passenger after wrongful refusal of ticket and failure to tender cash fare.

PUBLIC SERVICE COMPANIES — Innkeepers — Refusal to receive prizefighter on vacation.

QUASI-CONTRACTS — Must execution creditor refund money paid at the sale for a chattel not the debtor's?

SALES — Express refusal to warrant. Liability for delivery of goods differing in kind from the contract specification.

TORTS — Defamation by will not seen till after testator's death. Liability of the estate.

TORTS — Accidental injury to plaintiff while defendant is violating a cruelty to animals statute.

TRUSTS — Extra dividends in stock and cash; principal or income?

TRUSTS — Liability of bank for allowing trustee to deposit to his personal account, cheques payable to him as trustee.



















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